E NEXT ANNUAL MEETING WILL BE HELD AT MEMPHIS, TENN., OCT. 23-25

AMERICAN BAR ASSOCIATION JOVRNAL

APRIL, 1929

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New York Annotations to Restatement of Contracts

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Chicago Judicial Council Outlines Objectives

THE Judicial Council of Cook County, which practically means Chicago, has issued a tentative statement as to its objectives and the means of their attainment. As some of the most important of the improvements contemplated will, in the Council's opinion, require constitutional changes, it recommends at the outset an amendment to the Constitution permitting the submission of more than one amendment to the people at a time. The limitation on such submission in the Constitution at present makes it next to impossible to secure a change where there is considerable opposition or, as more frequently happens, where a considerable part of the legislators want some other amendments to have the preference and be submitted.

"Pending adoption of the necessary constitutional amendment and of appropriate legislation thereunder," the statement says, "the Council considers that it may be possible, perhaps at the present session of the legislature, to secure partial remedy of existing faults by means of general legislation. Under this head, in the Council's opinion, would come legislative measures accomplishing some or all of the following purposes:

(1) Making the court, instead of the jury, the judge of the law in criminal causes. (2) Granting to the judge, in both criminal and civil causes, power to instruct the jury orally and to sum up and comment on the evidence, as well as requiring exceptions to the giving or refusal of instructions in all such causes to be taken before the jury retires. (3) Reducing the number of peremptory challenges available to the defendant in criminal causes. (4) Increasing the maximum penalties for misdemeanors. (5) Revising the adult probation law. (6) Revising the parole law, by placing the power of ultimate decision in the courts and by extending the law to misdemeanors. (7) Giving the court power, in the case of jurors who are unable to serve when called, to require them to report for service at a designated later time. (8) Conferring upon the Supreme Court power to adopt rules for the regulation of procedure in civil causes.

"Besides advocating interim legislation of this description, the Council recommends the immediate establishment of a special branch of the Municipal Court of Chicago for the conduct of preliminary examinations, and the assignment thereto of competent assistant state's attorneys, clothed with discretion, exercisable where the circumstances properly so require, to waive the felony charge and thus effect final disposition of the case in the Municipal Court, obviating the necessity for a holding over to the Grand Jury—a step which has already been agreed to in principle by the Chief Justice of the Municipal Court and by the State's Attorney. Moreover, the Council purposes to proceed as soon as possible to the ascertainment and recommendation of such reforms as may be attained under the present rule-making power of the courts, utilized to its fullest extent. And as a preliminary measure, conducing to economy of time and expense in civil causes, it will here recommend to the judges of the Circuit and Superior Courts the adoption of rules providing that, if a party desires trial by jury, he shall at an early stage in the cause give notice to that effect, failing which the cause shall be tried by the judge without a jury; that a non-jury calendar be established comprising causes in which no such notice has been given; and that, with respect to jury trials, no cause shall appear on the jury calendar or be called for trial until noticed for trial by one party or the other."

The ends which the Council hopes ultimately to see realized in the several fields of court organization, cirminal law (including punishment and penal treatment of offenders), criminal procedure and civil procedure are thus set forth in the statement:

"The re-organization and unification of the various courts of Cook County, in such wise as to ensure

flexibility of internal structure and the maximum efficiency and economy of operation. An important element of this remodelling would be the vesting of power in the judges to appoint full-time official assistants, such as the masters and referees in the English Supreme Court of Judicature.

"A complete revision of that part of the Criminal Code relating to the substantive law of crime and punishment and the consolidation therein of all penal laws now found elsewhere in the statutes. In any such revision it would seem especially desirable that felonies and misdemeanors should be re-classified and re-defined; that the maximum penalties for misdemeanors should be increased so that a number of crimes now classed as felonies could be made misdemeanors and rendered capable of the same summary disposition as are misdemeanors under the existing law; and that the adult probation law as well as the parole law should be made to conform to more scientific standards.

"A complete revision, likewise, of such part of the Criminal Code as relates to criminal procedure. In this revision the principle to be followed would be that of restricting statutory provisions to the main features of the procedure, leaving its more detailed regulation to be dealt with by rules of court. Power should be vested in the courts to enact rules of this description.

"As part of the revision here contemplated, there should be a basic change in the mode of accusation. For indictment by the Grand Jury there should be substituted, in the case of most felonies, accusation by information, preceded by preliminary examination before a magistrate, as is now the practice in a large number of other jurisdictions. The rules as to the framing of indictments and informations should admit of the maximum brevity and simplicity, consistent with the requireent that the accused be informed of the nature and cause of the accusation. It should be open to the defendant to waive trial by jury in felony cases; the jury should cease to be judges of the law except in cases involving libel and political offenses; the number of peremptory challenges available to defendants should undergo some equitable reduction; the court should be given power to instruct the jury orally as well as to sum up and comment upon the evidence; and exceptions to the giving or refusing of instructions should be taken before the retirement of the jury.

"Furthermore, it should be carefully considered whether the power to fix the punishment should not be lodged with the judge in all except capital cases. Besides its other advantages, such a measure would enable the judge to inquire in an informal way into the previous record of the defendant, and the fact of previous conviction, accordingly, might be taken into consideration in fixing the punishment without that necessity for formal allegation and proof thereof which renders practically unworkable the present Habitual Offenders' Act.

"A substantial recasting of the existing rules of civil procedure, which are in large part cumbrous and inadequate. Whether the separate administration of law and chancery be retained or discarded, the need for modernization is equally obvious. Here, even more emphatically than in the case of criminal procedure, the revision, following the accepted principle of today, should take the form of a brief procedural statute or statutes, with power vested in the judiciary to complete the system by means of rules of court."

The personnel of the Cook County Judicial Coun-

cil, which was created by a formal resolution of the County Board with the approval of the Chicago Bar Association, was printed in the March issue of the JOURNAL, page 121.

Practical Estimate of the Worth of Lawyers

THE personnel of President Hoover's Cabinet shows once more how inevitably and unerringly the legal profession is drafted for service in the nation's vital affairs. It is a practical estimate of the worth of lawyers, which is worth scores of careless and prejudiced views. It should give a momentary pause to the critics who merely echo traditional clap-trap about the profession, without stopping to inquire whether there is any truth in it or not. Six of the nine members of the Cabinet are lawyers and six of the seven new members belong to the profession. Henry L. Stimson, the new Secretary of State, became a member of the firm of Root and Clark in 1893, two years after his admission to the Bar. In 1897 he was associated with the firm of Root, Howard, Winthrop and Stimson, and in 1901 with Winthrop and Stimson. He was U. S. District Attorney for Southern New York, 1906-1909. He was commissioned Major Judge Advocate U. S. Reserve in March, 1917.

The new Secretary of War, James W. Good of Chicago, was City Attorney of Cedar Rapids before beginning his long career in Congress as a representative from Iowa. In June, 1921, he resigned from that body in order to begin the practice of law in Chicago. Charles Francis Adams, of Massachusetts, Secretary of the Navy, was admitted to the Suffolk Bar in 1893. William D. Mitchell, of Minnesota, the new Attorney General, a lawyer as a matter of course, was promoted to a cabinet post from the responsible position of Solicitor General. Walter F. Brown of Ohio, Post Master General, has been a member of the firm of Brown, Hahn and Sanger, Toledo, O., since 1908. Arthur H. Hyde, Secretary of Agriculture, former Governor of Missouri, is also a lawyer and resides in Trenton, Mo.

Bill for Tenth Circuit Becomes Law

PRESIDENT Coolidge signed the bill to divide the Eight Circuit for the United States Circuit Court of Appeals and to create a new one to be known as the tenth. The passage of the measure is largely due to the activities of the special Committee of the American Bar Association. Mr. Amasa A. Paul, chairman of the committee, spent a good deal of time in Washington recently, urging favorable consideration of the measure in committees and in both Houses of Congress. The House passed the measure under suspension of the rules, and it went to the Senate, where it was passed on February 23, with an amendment inserting Kansas City as one of the places for the sitting of the Court in the Eighth Circuit. On February 25 the House agreed to this amendment and the measure went to the President, who promptly gave his approval. The Act is of special interest to lawyers in the Eighth and Tenth Circuits and it is therefore given in full, as follows:

Be it enacted, etc., That section 116 of the Judicial Code, as amended (U. S. C., title 28, sec. 211), is amended to read as follows:

"Sec. 116. There shall be 10 judicial circuits of the United States, constituted as follows:

"First. The first circuit shall include the districts of Rhode Island, Massachusetts, New Hampshire, Maine, and Porto Rico.

"Second. The second circuit shall include the districts of Vermont, Connecticut, and New York.

"Third. The third circuit shall include the districts of Pennsylvania, New Jersey, and Delaware.

"Fourth. The fourth circuit shall include the districts of Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

"Fifth. The fifth circuit shall include the districts of Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas.

"Sixth. The sixth circuit shall include the districts of Ohio, Michigan, Kentucky, and Tennessee.

"Seventh. The seventh circuit shall include the districts of Indiana, Illinois, and Wisconsin.

"Eighth. The eighth circuit shall include the districts of Minnesota, North Dakota, South Dakota, Iowa, Nebraska, Missouri, and Arkansas.

"Ninth. The ninth circuit shall include the districts of California, Oregon, Nevada, Washington, Idaho, Montana, Hawaii, and Arizona.

"Tenth. The tenth circuit shall include the districts of Colorado, Wyoming, Utah, Kansas, Oklahoma, and New Mexico."

Sec. 2. Section 118 of the Judicial Code, as amended (U. S. C., title 28, sec. 213; 45 Stat. L. 492; Public, No. 664, 70th Cong.), is amended to read as follows:

"Sec. 118. There shall be in the sixth, seventh, and tenth circuits, respectively, four circuit judges; and in the second and eighth circuits, respectively, five circuit judges; and in each of the other circuits three circuit judges, to be appointed by the President, by and with the advice and consent of the Senate. Each circuit judge shall receive a salary of $12,500 a year, payable monthly. Each circuit judge shall reside within his circuit, and when appointed shall be a resident of the circuit for which he is appointed. The circuit judges in each circuit shall be judges of the

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Attorney General of the United States

circuit court of appeals in that circuit, and it shall be the duty of each circuit judge in each circuit to sit as one of the judges of the circuit court of appeals in that circuit from time to time according to law. Nothing in this section shall be construed to prevent any circuit judge holding district court or otherwise, as provided by other sections of the Judicial Code."

Sec. 3. Section 126 of the Judicial Code, as amended (U. S. C., title 28, sec. 223; U. S. C., Sup. I, title 28, sec. 223), is amended to read as follows:

"Sec. 126. A term shall be held annually by the circuit courts of appeals in the several judicial circuits at the following places, and at such times as may be fixed by said courts, respectively: In the first circuit in Boston, and when in its judgment the public interests require in San Juan, P. R.; in the second circuit, in New York; in the third circuit, in Philadelphia; in the fourth circuit, in Richmond and in Asheville, N. C.; in the fifth circuit, in New Orleans, Atlanta, Fort Worth, and Montgomery; in the sixth circuit, in Cincinnati; in the seventh circuit, in Chicago; in the eighth circuit, in St. Louis, Kansas City, Omaha, and St. Paul; in the ninth circuit, in San Francisco, and each year in two other places in said circuit to be designated by the judges of said court; in the tenth circuit, in Denver, Wichita, and Oklahoma City, provided that suitable rooms and accommodations for holding court at Oklahoma City are furnished free of expense to the United States; and in each of the above circuits terms may be held at such other times and in such other places as said courts, respectively, may from time to time designate, except that terms shall be held in Atlanta on the first Monday in October, in Fort Worth on the first Monday in November, and in Montgomery on the third Monday in October. All appeals and other appellate proceedings which may be taken or prosecuted from the district courts of the United States in the State of Georgia, in the State of Texas, and in the State of Alabama to the circuit court of appeals for the fifth judicial circuit shall be heard and disposed of, respectively, by said court at the terms held in Atlanta, in Fort Worth, and in Montgomery, except that appeals in cases of injunctions and in all other cases which, under the statutes and rules, or in the opinion of the court, are entitled to be brought to a speedy hearing, may be heard and disposed of wherever said court may be sitting. All appeals and other appellate proceedings which may be taken or prosecuted from the district court of the United States at Beaumont, Tex., to the circuit court of appeals for the fifth circuit, shall be heard and disposed of by the said circuit court of appeals at the terms of court held at New Orleans, except that appeals in cases of injunctions and in all other cases which, under the statutes and rules, or in the opinion of the court, are entitled to be brought to a speedy hearing, may be heard and disposed of wherever said court may be sitting."

Sec. 4. Any circuit judge of the eighth circuit as constituted before the effective date of this act, who resides within the eighth circuit as constituted by this act, is assigned as a circuit judge to such part of the former eighth circuit as is constituted by this act the eighth circuit, and shall be a circuit judge thereof; and any circuit judge of the eighth circuit as constituted before the effective date of this act, who resides within the tenth circuit as constituted by this act, is assigned as a circuit judge of such part of the former eighth circuit as is constituted by this act the tenth circuit, and shall be a circuit judge thereof.

Sec 5. Where before the effective date of this act any appeal or other proceeding has been filed with the circuit court of appeals for the eighth circuit as constituted before the effective date of this act—

(1) If any hearing before said court has been held in the case, or if the case has been submitted for decision, then further proceedings in respect of the case shall be had in the same manner and with the same effect as if this act had not been enacted.

(2) If no hearing before said court has been held in the case, and the case has not been submitted for decision, then the appeal, or other proceeding, together with the original papers, printed records, and record entries duly certified, shall, by appropriate orders duly entered of record, be transferred to the circuit court of appeals to which it would have gone had this act been in full force and effect at the time such appeal was taken or other proceeding commenced, and further proceedings in respect of the case shall be had in the same manner and with the same effect as if the appeal or other proceeding had been filed in said court.

Sec. 6. This act shall take effect 30 days after its enactment.

A Striking Incident in the House of Lords

A STRIKING and solemn moment came in the proceedings of the British House of Lords on Feb. 2 of the present year when Lord Dunedin read the judgment of the late Lord Haldane, in the case of Medway Oil and Storage Company Limited vs. Continental Contractors Limited, on appeal from the Court of Appeal in England. The opinions of great judges live after them, but presumably it is seldom that an opinion and judgment in a pending case are given from the tomb. Lord Dunedin prefaced the reading with the statement that "before his lamented death Lord Haldane had prepared a judgment in this case and as the conclusion he arrived at is that which will be arrived at by the vote of the House, in accordance with precedent I propose to read his judgment."

The case involved "the principle which ought to prevail in the taxation of costs when the successful defendants to an action have put in a counter-claim and have been defeated on it with costs." The view of McKinnon J., below, was that the proper method was to "give the defendant all costs incurred in resisting the claim, depriving him only of any costs which he has incurred exclusively in supporting his defeated counter-claim." The Court Appeals held on the contrary "that where evidence is given of facts which are put forward in connection with the claim and counter claim in common, there is no reason why the plaintiff should not be allowed the costs incurred in relation to them when resisting the counter claim on which he has got judgment, and the duty of the taxing master is to apportion the amounts when taxing the entire costs." The judgment of Lord Haldane reviews the authorities and adopts the view of McKinnon J. as opposed to that of the Court of Appeal.

Medical History of the World War

ANNOUNCEMENT that a medical history of the War, in fifteen volumes, has just been completed by the Army Medical Corps, was recently made by the War Department. From time to time Congress has specifically provided the funds necessary for the production of the work. We quote the following from the department's announcement, as printed in the *United States Daily*.

"When Major General Merritte W. Ireland, the Surgeon General of the Army, recently forwarded to the Government Printing Office the manuscript for Volumes III, IV, X and XII of the history officially known as 'The Medical Department of the United States Army in the World War' he was adding the finishing touch to a stupendous and laborious task on which his Department, among other activities, had been engaged since the close of the World War.

"This history was compiled not only as a permanent written record of the problems and accomplishments of the Medical Department of the Army in the World War, but also as a contribution to the progress of medical science throughout the world.

"The editor-in-chief who guided this publication through a successful conclusion was Lieutenant Colonel Frank W. Weed of the Regular Army Medical Corps. In his editorial assignment he was ably assisted by some of the leading medical men in civil practice who as emergency officers were identified with the work of the Medical Department during the World War. At their own expense and the sacrifice of much of their valuable time, these World War veterans contributed material for many of the chapters of this monumental work.

"Great Britain and Germany have already published

similar histories and France and other countries are now actively engaged in the production of one.

"The United States publication complete consists of 15 volumes (17 books) under the following titles: I. The Surgeon General's Office; II. Administration American Expeditionary Forces; III. Finance and Supply; IV. Activities Concerning Mobilization Camps and Ports of Embarkation; V. Military Hospitals in the United States; VI. Sanitation; VII. Training; VIII. Field Operations; IX. Communicable and Other Diseases; X. Neuro-psychiatry; XI. (Part 1) Surgery.—General Surgery, Orthopedic Surgery, Neuro-Surgery; (Part 2) Surgery.—Empyoma, Maxillofacial Surgery, Otolaryngology; XII. Pathology; XIII. Reconstruction and Vocational Education; Army Nurse Corps; XIV. Medical Aspects of Gas Warfare; XV. (Part 1) Statistics, Army Anthropology; (Part 2) Statistics, Medical and Casualty Statistics."

The publication raises the question of what has been done to preserve, not only as a matter of sentiment but as a record of valuable practical experience, the accomplishments of the legal profession during the same period. So far as the public and the profession in general are informed, little if anything has been done. And yet there must be an immense mass of material valuable for history and for the future that is only awaiting proper compilation and treatment.

Institute of International Law to Meet in New York Next October

DR. JAMES BROWN SCOTT, president of the Institute of International Law, has made public a preliminary announcement regarding the ten days' session of the Institute which will take place at Briarcliff Manor, New York, from October 10 to 18. The Institute is coming to America as the guest of the Carnegie Endownment for International Peace and will meet on American soil for the first time since its organization fifty-six years ago.

Founded in Ghent in 1873, the Institute has met 36 times: six times each in Belgium, and Switzerland; five times in France; four times each in England and Italy, three times each in Germany, Holland and Scandinavia and once each in Austria and Spain. The meeting scheduled in 1920 for Washington was postponed.

While the Institute is preponderantly European in its membership and has held all of its previous meetings in Europe, its organization was conceived in the brain of a naturalized American citizen who fled, a political refugee, from his native country, Germany. It was organized by Francis Lieber, then Professor of Political Science in Columbia College, now Columbia University. It was founded as an exclusively scientific association, without official character, having for its object to aid the growth of international law. Its membership is limited to sixty members and sixty associates. Among the American members are: Elihu Root, John Bassett Moore, Professor Philip Marshall Brown of Princeton University; Professor Grafton Wilson of Harvard University; Professor Edwin M. Borchard of Yale University; Mr. Frederic R. Coudert of the New York Bar; Dr. David Jayne Hill, former American ambassador; Professor Charles Cheney Hyde of Columbia University and Professor Theodore S. Woolsey, Professor Emeritus of Yale University.

The members of the Institute will arrive on the "S. S. George Washington" upon the 8th or 9th of October and will go at once to Briarcliff Manor. They will be formally welcomed by President Nicholas Murray Butler of the Carnegie Endownment for International Peace, who also is president of Columbia University, upon the faculty of which Francis Lieber was serving when he proposed the foundation of the Institute. After the formal welcome by Dr. Butler, it is hoped that Elihu Root will deliver the presidential address which it had been planned for him to deliver at the time of the postponed meeting in 1920.

On October 12, the anniversary of the discovery of America, President Scott of the Institute will address the meeting on "The Discovery of America and its Influence upon International Law."

In addition to Dr. Scott, the following are the officers of the Institute: Honorary President, Baron Alberic Rolin, Professor Emeritus at the University of Ghent, who was an Assistant Secretary at the foundation meeting held from September 8 to 11, 1873; First Vice President, Albert de Lapradelle, professor of International Law at the Faculty of Law at Paris; Second Vice President, Comte Michel Rostworowski, professor and formerly rector of the University of Cracow; Third Vice President, Enrico Catellani, Italian Senator and professor at the University of Padua; Secretary General, Charles de Visscher, professor of International Law at the University of Ghent; Treasurer, André Marcier, professor on the Faculty of Law of Lausanne.

On the evening of October 18, the members will be guests of the Carnegie Endowment for International Peace at a dinner at which President Butler will preside. October 19th they will be guests of the University Club of New York; on October 20th they will be received at Columbia University, and that evening will be given a reception by the Association of the Bar of New York. Tuesday, October 22, the members of the Institute will leave New York for Washington, stopping at Princeton and Philadelphia. In Washington they will be received by government officials.

"Las Siete Partidas" to Be Published at Last

INFORMATION is received that within a very short time the English translation of "Las Siete Partidas," the old Spanish Code, will be published under the auspices of the Comparative Law Bureau of the American Bar Association. This translation, by Mr. S. P. Scott, has been in the hands of the Bureau for a good many years, but it has not heretofore been possible to secure funds for the publication. The financial obstacle, however, was overcome when Mr. KixMiller, head of the Commerce Clearing House, offered to defray the expense of publication, which offer was of course readily accepted. The decision to become the Macaenas to this enterprise was made, it is said, as a result of a chance visit by the donor to a meeting of the Comparative Law Bureau at Buffalo. Discussion of ways and means for securing the Code's publication was going on when he entered. As a lawyer the subject of the Code attracted and interested him and as a publisher, he found the ways and means of giving the work to the public readily at hand.

A Great Canadian Passes

IT WAS the irony of fate that Sir James Aikins should pass away only three days after the Bar of Canada and distinguished representatives of the Bars of other nations had united to do him honor on the completion of fifty years in the practice of law. On the evening of Feb. 25 Sir James ten-

dered a banquet to the Bench and Bar of Manitoba and to other guests who had gathered from a distance to congratulate him in his long and useful career at the Bar and as a promoter of international good will. He was not able to attend this function, but his indisposition was not supposed to be serious. He sent a message of regret and expressed the hope that his absence would not mar the enjoyment of the occasion.

At the banquet many tributes were paid the distinguished lawyer. Sir Francois Lemieux, Chief Justice of Superior Court of Quebec, said that "with tireless energy, with British tenacity and with the generosity of a Macaenas, he firmly established this great institution, the Canadian Bar Association, which spreads from coast to coast, and whose ultimate object is to promote respect for justice." Hon. Robert E. L. Saner, former President of the American Bar Association, who attended as a guest of the Canadian Bar Association, told of his services in promoting good will between Canada and the United States. "He has taught us to know each other better," Mr. Saner said, "and to know each other better is to have greater confidence in each other." Tributes were also paid by Mr. W. J. Tupper K. C., and Hon. R. W. Craig K. C. chairman of the joint committee representtative of the Canadian Bar Association, the Law Society of Manitoba and the Blackstone Club. During the banquet a telegram of congratulation was received from the Quebec Bar Association, signed by Hon. L. A. Taschereau, premier of Quebec.

Among the letters of congratulation received by Sir James were communications from: Rt. Hon. W. L. MacKenzie King; Rt. Hon. F. A. Anglin, chief justice of Canada; Rt. Hon. Lord Hewart of Bury, lord chief justice of England; Hon. Hugh Kennedy, chief justice of the Irish Free State; Hon. W. H. Taft, chief justice of the United States; Rt. Hon. Viscount Finlay; Rt. Hon. Lord Buckmaster; Rt. Hon. Lord Shaw of Dunfermline; Rt. Hon. Lord Darling; Rt. Hon. Mr. Justice Eve and Rt. Hon. Mr. Justice Macnaghten; Condie Sandiman, K. C., dean of the faculty of advocates, Edinburgh; Rt. Hon. H. P. Macmillan, K. C.; F. Villeneuve Smith, K. C.; Hon. Senator Manuel Fourcade; Maitre Armand Dorville; Dr. R. Masujima, Tokio, Japan; Hon. John W. Davis; Hon. Charles E. Hughes, and many others.

A day after the JOURNAL received the foregoing details this telegram was received from Mr. E. H. Coleman. secretary of the Canadian Bar Association: "Sir James Aikins died suddenly last night." The news will be received with sorrow by the very many members of the American Bar Association to whom Sir James was personally known. He was an incarnation of international good-will and he never failed to stress that note in the various addresses he made to Bar Associations on the American side.

Linking Studies of Law and Life

YALE University has received gifts and subsidies representing a capital of $7,500,000 for the establishment of an Institute of Human Relations in which the University's resources for the investigation of man's behavior from the individual and social viewpoints will be concentrated, according to an announcement made by President James Rowland Angell. The Institute is designed to bring together sociologists, economists, biologists, and psychologists, who will combine with their colleagues in such applied fields as law, medicine, and psychiatry to correlate knowledge of the mind and body and of individual and group conduct, and to study further the interrelations of the many factors influencing human actions.

In commenting upon the importance of the Institute from the point of view of the study of law, Robert M. Hutchins, dean of the Yale Law School said, "This development is of the utmost significance for the law and indeed for all the social sciences. In planning the Institute we have had constantly in mind the need for the co-operation of lawyers and social scientists in the study of the group aspects of human behavior. They together will in turn co-operate with biologists, physicians, psychiatrists, and psychologists in the study of individual behavior.

"The importance of this co-operation to the law and social science is obvious in considering for example two of the many contemporary problems which the Institute could study: the family and crime. The present ineffective rules of law on these subjects must be ascribed in large measure to the fact that the legal doctrines have been regarded as ends in themselves, having no relation to the individual and group behavior they were intended

to govern. The attempt in the Institute will be to study the rules of law in relation to life as it is being lived in the United States today, in the light of all the data that economists, political scientists, psychologists, and psychiatrists can bring to bear upon them.

Magna Carta Pageant Again Presented

THE Magna Carta Pageant which was so successfully presented at the Semi-Centennial meeting at Seattle has again been given—this time by the International Relations Club of the East Denver, Colorado, High School. Reports are that the presentation was extremely good and the reception accorded it highly enthusiastic. This event is gratifying both to the Magna Carta Pageant Committee and the officers of the Association, and it is their hope that this is merely the first of a long series of productions by high schools, clubs, civic societies, etc. In no other way can the real significance of Magna Carta as a document of historical and vital present-day significance be so clearly set forth. The Executive Committee has authorized the publication of the text in book form during this year. As directions for stage production will doubtless be added, the volume will be rendered doubly useful to those who want to give the pageant.

American Society of International Law to Meet in Washington

THE American Society of International Law will have its twenty-third annual meeting at the Willard Hotel, Washington, April 24-27. Charles Evans Hughes, president, will deliver the opening address on Wednesday, April 24 at 8:30 p. m. Dr. James Brown Scott, vice-president of the Society and Secretary of the Carnegie Endowment for International Peace, and director of the Endowment's Division of International Law, will read a paper on "The Treaty Between Italy and the Vatican." A report on the progress of international law will be given by the recording secretary, George A. Finch, who is assistant secretary of the Carnegie Endowment for International Peace.

Other important speakers and subjects follow: Thursday, April 25 at 10 o'clock, report of special committee on codification of International Law, Jesse S. Reeves, chairman, followed by a round table conference. In the afternoon report of the special commmittee on enlargement of state department publications, William C. Dennis, chairman; survey of governmental publications for the study of international law, by Tyler Dennett, chief of the Division of Publications of the Department of State; round table conference on publications for the study of international law, governmental and non-governmental, conducted by Manley O. Hudson, Bemis Professor of International Law, Harvard Law School. In the evening there will be an address on "The Pact of Paris for the Renunciation of War; Its Meaning and Effect in International Law," by Roland S. Morris, professor of International Law, University of Pennsylvania.

On Friday, April 26, Chandler P. Anderson, American Commissioner, Mixed Claims Commission, United States and Germany, will speak on "The Scope and Character of Arbitration Treaties"; Charles Cheney Hyde, Hamilton Fish Professor of International Law and Diplomacy, will present "The Place of Commission of Inquiry and Conciliation Treaties in the Peaceful Settlement of International Disputes"; Charles Henry Butler, author of "Treaty-Making Power of the United States," will discuss, "Limitations of the Treaty-Making Power of the United States in Matters Coming Within the Jurisdiction of the States," beginning at 8:30 in the evening.

Elihu Root is the honorary president, and Charles Evans Hughes, president. Edwin B. Parker is chairman of the executive council. Other officers are: Honorary Vice-Presidents: Charles Henry Butler, Frederic R. Coudert, John W. Davis, Charles Noble Gregory, Frank B. Kellogg, John Bassett Moore, Edwin B. Parker, Jackson H. Ralston, George Sutherland, William H. Taft, George Grafton Wilson and Theodore S. Woolsey; Vice-Presidents: Chandler P. Anderson, David Jayne Hill and James Brown Scott; Recording Secretary: George A. Finch; Corresponding Secretary, William C. Dennis.

Judges of the Ohio Court of Appeals, First District, as they appeared on the Bench for the first time in robes, in compliance with the unanimous resolution adopted by the Ohio State Bar Association at its recent meeting. The Judges are, reading from left to right: Judge Simon Ross, Presiding Judge Wade Cushing and Judge Francis M. Hamilton.

AN ENGLISH LITIGATED CASE

Calendar of an English Law Suit from Happening of Grievance to Judgment Throws Interesting Light on Division of Labor Between Barristers and Solicitors and Also on Much Praised Method of Conducting a Case and Trial—Progress Through Lower Court, Court of Appeal and House of Lords

By Richard W. Hale
Member of the Boston Bar

EVERY American Lawyer interested outside of his own country is curious to know how our brothers in England work with their division of the profession into barristers and solicitors. For another thing the English method of conducting a case and trial has recently been praised with justice. It has seemed to the writer that a recital of the calendar of an English law suit—from the happening of the grievance litigated to the judgment—would throw much light upon both of these points. Through the courtesy of J. E. W. Rider of the well-known firm of solicitors, Rider, Heaton, Meredith & Mills, of New Square, Lincoln's Inn, this article thus describes

Viscount Tredegar V. Harwood and Others

This case was thrice decided,

1. By Mr. Justice Tomlin.
2. By the Court of Appeal.

The above decisions are in 1928, 1 Ch. 59.

3. By the House of Lords. Dunedin, Shaw of Dunfermline, Phillimore, Blanesburgh. The Decision is in 1929 A-C 7d.

The best way to present this case to American readers appears to be in calendar form with each event under its date. The correspondence prior to suit is printed in the appeal case. The "cases laid before counsel," including the principal brief, and the opinions given during the various steps have been furnished privately. The whole file has been given to the Harvard Law School where it can be seen.

The facts out of which the controversy arose are:

1. In a lease dated July 7, 1924, under which the defendant, Harwood, held as tenant of the plaintiff Viscount Tredegar, the clause for insurance by the lessee provided for policies,

> "In the *Law Fire* Office or in some other responsible Insurance Office to be approved of by the Lessor."

(This is a very well-known form. Cf. Woodfall 21st Edn. 1204).

The lease contains the usual proviso for re-entry if there is a breach. The rent was a trifle, representing interest on the land value. The property was built upon; and mortgaged (subject to the lease) to a Building Society. The mortgage required the mortgagor to insure

> "in such office and for such amount as the (Building) Society shall appoint."

The Building Society appointed only the *Atlas* Assurance Company.

The lessee did not insure in the *Law Fire* Society. The lessor approved no other and claimed a breach. The case for the lessee was that the other company was within the provisions of the lease. Perhaps the motive of the lessor in not approving the Atlas Insurance Company was material. He had thousands of such leases and wanted all the insurance to be in one company. He did not say that the Atlas Assurance Company was not responsible.

2. May 27, 1926, solicitors for lessee requested the lessor to approve the Atlas Company.

3. June 12, 1926, lessor refused but stated that his reasons were "estate management reasons."

Newport solicitors then consulted London solicitors and

4. June 24, 1926, London solicitors handed to a barrister, Mr. Dighton Pollock, a "preliminary case for the opinion of counsel" including "instructions to settle writ."

5. June 30, 1926, Mr. Pollock gave his opinion saying "I have settled the accompanying draft writ accordingly."

6. July 15, 1926, a writ based on this draft was issued and July 19th service accepted. The case took the number 1926-T No. 1051.

7. November 18, 1926, a statement of claim was delivered (before long this was printed). This is in narrative form and tells the story as I have told it above. The specific claims are for a forfeiture and mesne profits. Both are fictitious, for the real claim was to force insurance, the pleader foreseeing that the forfeiture would be relieved against if the right should be established.

8. At some intervening date the defendants "laid a case before counsel" as appears from

9. November 27, 1926, solicitors for the defendant wrote to solicitors for the plaintiff:

> "Our counsel advise that it is necessary that we should have particulars of the 'estate management reasons' mentioned in paragraph 10 of the statement of claim before we can deliver our defense in this matter."
>
> "We should be glad to know if you will be willing to supply these to us and thus avoid the necessity of our applying to the Master."

10. December 4, 1926, solicitors for the plaintiff having taken the above letter to their barrister, he wrote an opinion including drafts both of a covering letter and of the particulars.

11. December 11, 1926, solicitors for the plaintiff wrote the covering letter as drafted and supplied the particulars as drafted. (Before long these were

printed.) They state at length the reasons of convenience.

12. December 21, 1926, defendant's solicitors delivered a defense and counter-claim. The defense was possession pleaded in eleven words. The counter-claim was for equitable relief if the plaintiff was right.

13. February 17, 1927, solicitors for the plaintiff took an opinion of counsel upon the defense and counter-claim and his advice was

a, "No reply other than a joinder of issue is allowed to a defense of possession" and "a joinder of issue will be implied."

b, "No defense to the counter-claim is necessary because it contains no allegation of fact."

c, "No discovery is allowed in an action which seeks a forfeiture."[1]

d, He advised against making the technical objection that both defendants, the lessee and the building society, could not be in possession at the same time and thus both have the advantage of that defense.

14. The next step was that solicitors for the plaintiff on February 23, 1927 served a notice reading: "Take notice of trial of this Action before a Judge in Middlesex for the 7th day of March 1927."

15. Beginning March 14, 1927 solicitors corresponded to obtain reciprocal admissions and by May 23, 1927 each was satisfied with what the other had admitted. Documents for the court were then prepared. These are in parallel columns. Each side made a statement of what it wanted admitted. Each admitted all it could or would and did it by specific answers which appear in the right column.

16. Mar 25, 1927, solicitors for the plaintiff got an "opinion on evidence." It was based not on a "Case" but upon "Proofs of Witnesses' Evidence." These are the Estate Agent the Estate Solicitor, and a Clerk in the Law Fire [Insurance] Office. "Proofs" are good narrative memorandums from which any one could have examined the witnesses.

This time the barrister was Charles R. R. Romer who advised in substance:

a. Don't raise any issue except the one of law which your case was brought to settle.

b. You may wisely dicker to get an admission as to the proper size of the policy which is adequate protection for the property.

He also discussed proof of facts to provide for the contingency that an agreement on the facts should not be reached. Later such an agreement was made so the trial was without witnesses.

17. April 7, 1927, plaintiffs furnished defendants with a list of documents in two classes. The first, what was going to be shown; the second, privileged documents. The latter list mentions only instructions to counsel, his opinion and the correspondence between solicitors.

18. Preliminary to the trial solicitors for the plaintiff prepared a brief. This is on large folio sheets of paper. The left-hand quarter of the back has a summary of the decision to be sought.

The brief begins with a list of the documents to be handed in with it of which we need mention here in addition to what is indicated above only

"Correspondence which has been agreed,"
"Plaintiff's notice to admit and produce,"
"Defendant's notice to admit and produce."

The Brief goes on to state the case very largely as a barrister might state it in opening. Yet it includes human touches, for instance, a suggestion that cross-examination of solicitors for the mortgagee who were agents for the Atlas Insurance Company might develop special motives for favoring that company with the business. It discusses the meaning of the covenant, repeats the defendant's admissions, discusses the kind of evidence which is available and cites three cases on the main point.

19. June 1, 1927. Trial took place before Mr. Justice Tomlin. Against the judgment in the margin of the printed case before the House of Lords is "Pleadings filed 17/6/27." Romer for the plaintiff, Spens for the defendant. The opinion and the colloquy with counsel were taken in shorthand. See the Appendix to the printed case, page 17.

The judgment is, after recitals,

"The Court doth declare that the Plaintiff is entitled to recover possession . . . and it is ordered that the Defendant be relieved from forfeiture . . . on the following conditions."

viz. to insure and to pay costs, an appeal within 14 days to be a stay.

20. The defendant appealed by a "notice of appeal." Appendix page 26.

21. October 14, 1927. "Upon motion by way of appeal" the appeal was argued in the Court of Appeal and "to stand for judgment." The Master of the Rolls and Lord Justices Sargent and Laurence.

October 27, 1927. Judgment reversed, action dismissed. The opinions were taken in shorthand.

The judgment is that the action is dismissed and that the plaintiffs are to pay the defendants' costs of this action and costs occasioned by this appeal.

Briefly, the opinions are that the lease contemplates an option to the tenant to insure in the Law Fire Office or some other. He exercises the option by asking for an approval of some other. That approval cannot be unreasonably refused. To rely on an extraneous reason not connected with the property or the insurance company is unreasonable. Some stress is laid upon the existence of an almost equally common form which substitutes the word "selected" for "approved" and is said to ring the appropriate change.

22. The Plaintiff's solicitors took the opinion of three barristers upon this defeat. They laid before the barristers a "case" which included the brief on the appeal, the Times report of the appeal, the shorthand notes of the Tomlin trial, a list of the documents supplied to the Court of Appeal, the shorthand notes of arguments and opinions in the Court of Appeal.

This is endorsed—

"Instructions to advise on appeal to the House of Lords and other matters and opinions thereon." November 1927.

23. These barristers by their joint opinion advised an appeal to the House of Lords. The opinion is 22 lines long.

24. This appeal was signed by them. It is the

1. This is like the privilege against self incrimination. Maxborough v. Whitwood U. D. Council (1897 2 Q B 111.)

first document in the printed case in the House of Lords and is 14 lines long.

The opinion also advises that pending an appeal, any new leases given should have an even more strenuous insurance clause, a form for which the opinion "settles."

25. With the petition or appeal, the plaintiff filed a "schedule" which said that documents were attached, but these were only the judgment of the Court of Appeal and the judgment of Tomlin J. followed by

> "We humbly conceive this to be a proper Case to be heard before your Lordships by way of Appeal."

The foregoing constitute the petition and appeal and are followed by

26. Case for the Appellant—10 printed pages.

27. Respondent's case—8 printed pages.

These two correspond to the statement of facts in an American brief, up to the last numbered paragraph, called "Reasons," which reasons in turn correspond to an American list of errors assigned.

28. Next follows an appendix with an index prefixed to it. This contains No. 6, No. 7, No. 11, No. 12, No. 13, and No. 15 above. It also contains Mr. Justice Tomlin's opinion from the shorthand, and the colloquy of counsel with him, the Court of Appeals opinions, the documents put in evidence at the trial, and the correspondence.

29. The judgment of the House of Lords is a separate printed document—also from the shorthand notes.

The Lords who sat were divided, three for the Lessor, Dunedin, Shaw of Dumferline, and Phillimore; and one for the Lessee, Blanesburg, who did not attend on the day of judgment but whose judgment was read.

Briefly, the decision is that the requirements that any insurance company shall be responsible and shall be approved by the Lessor are conjunctive.

Lord Shaw sums this up

> "The forms of contract, under which the reasonableness of withholding consent is made a term, are perfectly familiar, and they were not adopted in the present case; and the condition of the lessor's consent is a condition precedent in absolute terms.
>
> "On the merits I should, further, hold, if the matter were gone into, that the refusal here was perfectly reasonable and that it would be wrong to confine the reason in such case to the particular house exclusive of all considerations as to the management of the estate."

and the report ends

QUESTIONS PUT:

That the Order appealed from be reversed.

The Contents have it.

That the Order of Mr. Justice Tomlin be restored with the variation that the twenty-one days therein mentioned run from the date of this judgment instead of the date of the judgment of Mr. Justice Tomlin.

The Contents have it.

That the Respondents do pay to the Appellant his costs in this House and in the Court of Appeal.

The Contents have it.

New British Rules of Professional Conduct

New Rules of professional conduct are contained in a report to the Attorney General made recently by the General Council of the English Bar at a meeting in the Inner Temple Hall in London, according to the Ohio Law Bulletin. Among the rules announced are the following:

"A barrister in England may advise an American lawyer in this country in non-contentious matters (in which no litigation in this country is contemplated or in progress) without the intervention of an English solicitor.

"Local barristers in a provincial town may not have their names entered in a trades telephone directory.

"The papers in a brief of counsel are the property of the client, and counsel has no right to lend them to any one without the consent of the client. But in the case of documents which are read in open court no question of confidence can arise, and the consent of the client may in ordinary cases be assumed for the loan of copies to reporters or shorthand writers to enable them to correct their reports.

"A King's counsel may appear without a junior at inquiries held before an inspector of the Ministry of Health.

"A counsel who is briefed in an action at *nisi prius* which is unsuccessful is not entitled of right to be briefed at a new trial if one is ordered after appeal.

"A barrister who is subsequently admitted to holy orders cannot act in both capacities concurrently.

"A barrister cannot answer legal questions in newspapers or periodicals, whether for a salary or at ordinary literary remuneration: (1) Where his name is directly or indirectly disclosed or liable to be disclosed; or (2) where the questions answered have reference to concrete cases which have actually arisen or are likely to arise for practical decision."

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HOW SHOULD A CRIMINAL TRIAL BE REPORTED IN A NEWSPAPER?

Views of Teacher in School of Journalism of University of Wisconsin as Set Forth in Text Book Prepared for Use of Students—Reporters Should Have Clear Understanding of Steps in Process of Trial—Courts Should Not Be Treated as Mere Stages for Public Amusement—Setting, Principles, Witnesses, Evidence, Etc.

HOW should a criminal trial be reported in a newspaper? The lawyer might not be able to give a definite answer on the spot to that question, because it involves a knowledge of newspaper technique with which he is seldom familiar. But he has some very definite ideas as to how a criminal trial should *not* be reported. It should not be handled so as to give the public the false idea that the processes of justice are just another form of theatrical sensationalism; so as to make great figures out of quarreling attorneys and of judges who play to the galleries and the newspapers; so as to elevate unessential incidents and the reaction of the curiosity seekers who fill the benches to a position of importance, leaving the legal question involved entirely out of the picture; in brief, so as to bring discredit on one of the greatest of public concerns, with a consequent impairment of public confidence and confusion of the public mind.

The subject is one to which both the legal and the newspaper profession have in the past few years devoted attention. The discussion at the meeting of the Bar Association Delegates at Philadelphia, at which several leading representatives of the press were present, will be recalled. The more recent activities of the Committee on Co-operation of the Press and Bar of that section, of which Mr. Andrew R. Sherriff of Chicago is Chairman, are no doubt fresh in the minds of many readers. It is therefore interesting to note the attitude which the School of Journalism of a great university is taking on the subject—how it is training its students to report court proceedings. We find the evidence of this attitude in a book just published by D. Appleton and Co., entitled "Newspaper Reporting of Public Affairs," written by Mr. Chilton Rowlette Bush of the School of Journalism of the University of Wisconsin.[1]

The term "public affairs" is a broad one and the author states at the outset that it is not used in the title "in the high sounding sense as applied to international relations, foreign politics and national affairs, but in the usual sense as applied to popular government, politics, and private business, as they affect the affairs of the ordinary citizen in the local community." Under this head the processes of the courts constitute an important division, and over half the entire volume is devoted to how the reporter should deal with news from those sources. As the criminal courts furnish material of greater interest to the public than the civil tribunals, and in consequence the greater temptation to journalistic exploitation, we shall confine our attention in this brief article to the standards of reporting in that field set up and taught to students.

In the first place Mr. Bush thinks it necessary for the reporter to have a definite understanding of the various steps in the trial of a criminal case. He gives him in popular style a great deal of useful information on this subject. He does not expect the reporter to be a lawyer, but he expects him to learn the outstanding details of procedure. As for the substantive law, he is told he can get that from counsel, always keeping a grain of salt ready for use to avoid having a biased view foisted on him by enthusiastic advocates. Now for the actual reporting of the trial: At the very outset we encounter the contrast between the strictly legal idea of reporting a case, as shown in the books, and the strictly journalistic idea. Describe the scene? Most assuredly! He says:

"In many cases it is important for the newspaper reporter to describe the setting. Courts of justice ought not to be treated as mere stages set for the amusement of the spectators and described for the amusement of newspaper readers, but no harm is done in providing the reader with a picture of the trial scene; the principal harm arises out of the sensational reporting of unsavory cases, not from reporting interesting cases in an interesting manner. Many important and interesting trials are held in unfamiliar and picturesque places, as for example, the so-called evolution trial at Dayton, Tennessee; and often the juries and the judges have quaint and rugged personalities. More often, however, the peculiar setting that a trial possesses is given to it by the character of the principals. The following description of the setting of a trial serves to give the reader a background for understanding the trial and provides the reader with a conception of the forces engaged and the stakes at issue:

"'Smiling as ever, sharp blue eyes twinkling behind his gold spectacles, Mr. Van Dusen entered the court room to face the charges with every mark of serene confidence. His wife, his son, his son's wife, the battery of expensive counsel, followed in his wake.

"'Mr. Rood, the co-defendant, stooped, thin, gaunt and gray, chewing an unlighted cigar, came almost shuffling in, his legal battery around him. They nearly filled the well before the bench.

"'A score of newspaper men formed the next phalanx. Three inadequate rows took care of the few spectators who could get in, including some witnesses, among whom were Henry Louis Dill, the Philadelphia publisher, and United States Senator Wilson, whose investigations had helped to indict the defendants.

"'After eighteen months of sparring in grand jury rooms and judges' chambers, the trial to determine whether a cabinet officer had accepted a bribe was about to begin.'

"The reporter, however, has no right to provide his readers with a false setting for a trial. The following lead in the opening story of the trial of a prohibition agent charged with murder is a deliberate attempt to provide a false setting, and is aimed to prejudice the reader against the defendant at the very beginning of the trial:

"'Old Charles Gundlach's blood-stiffened garments played Banquo's ghost in the federal court today when the state of

1. D. Appleton and Co., New York, Price $3.

Maryland came to grips with the federal government, on its method of enforcing the Volstead Act in the ancient commonwealth that was founded by Lord Baltimore as a refuge for the oppressed."

The following paragraphs deal with "Reporting the Evidence":

"Because some criminal trials contain the elements of drama they are among the best news stories, and there is, consequently, a present danger that the homicide and divorce courts will be too frequently used as side shows to entertain a section of the public which craves morbid sensations. Sharing the blame for the evils inherent in this current practice of 'super-reporting' certain murder and divorce trials are the sensational newspapers, the courts, public officials, and the public and its new attitude as regards morals. The remedy for the situation cannot be stated in a simple formula. How to report each future case will, for the time being, have to be decided by each newspaper at the moment; a remedial formula cannot be adduced until public and professional opinion have crystalized in future judicial decisions, statutes, and legal and journalistic codes of ethics, and there has arrived a new adjustment between the economic principles of newspaper publishing and the levels of public taste. Suffice it to say that in the interests of society the current methods employed by some newspapers are to be condemned, and the solution will probably come as a result of publishers refusing to give the public what it undoubtedly desires.

"We are concerned here with only the dramatic and literary elements that pertain to the reporting of criminal trials. The plight of the person accused of a crime or the plight of his victim is frequently as interesting to a reader as is the well-conceived plot of the imaginative writer. The narrative writers borrow many of their plots from real life and only enhance them by the invention of new characters and situations. The principals and witnesses in criminal trials are frequently like those that one encounters in fiction and drama. The conflict theme and the devices of suspense and climax are also elements in criminal trials, though seldom as apparent as in fiction, in which the writer's imagination has free rein.

"These facts the reporter should keep in mind when he is reporting a criminal trial, both for the purpose of making the report interesting and for the purpose of guarding against inaccuracy and partiality. To make his story interesting the reporter should be painstakingly careful in the selection and arrangement of his material and in the emphasis and description that he employs.

"Each principal and witness, to the spectator in the court room and the newspaper reader, is a dramatis persona. Some of them even resemble heroes and villains, but to portray them deliberately as heroes and villains is to sin against truth and to violate the ethical standards of conduct. If by self-revelation a defendant, witness or attorney makes himself a hero or villain, the reporter, of course, should be grateful for this opportunity to make his story interesting; but the reporter ought never to treat the characters as anything but what they reveal themselves to be. Yet the reporter should understand that to his readers every principal in a trial is, after all, a character. For that reason he ought to describe the principals—describe their persons and manners, if necessary."

How to deal with principals and witnesses is thus set forth:

"Frequently it is necessary to describe the manner or attitude of the witness or principal. The reporter, however, should guard against exaggeration or the use of adjectives which present an untrue picture, for to the newspaper reader as well as to the jury the manner of a witness is as much a part of his testimony as his word. . . .

"Although identification and description of a witness is usually necessary, the reporter should avoid attaching 'labels' to characters. The constant reference to a defendant in a homicide trial as the 'thrill-slayer,' the 'pig-woman,' or 'the Fox' presents a false picture of the defendant. Seldom does any label fit a character; to label a character is not only untrue characterization but exhibits lack of literary skill. If a writer cannot present a picture of a character through self-revelation by the character, by the testimony of other characters, and by a simple description of manner, dress and gesture, he is too incompetent as a literary craftsman to be entrusted with character delineation. . . .

'The situations described by witnesses in some trials ought not to be reported at all. Although it is necessary in the settlement of divorce cases and in the determination of guilt in criminal cases for the whole truth to be told in the court room, the reporter is not obliged to convey this information in its entirety to his readers when the situations described are offensive to morals, or are shocking, repulsive, or otherwise offensive. The reporter can usually picture offensive scenes in a manner which provides the reader with a judgment as to the characters in the scene but which does not offend the reader."

The necessity for the good reporter to "look alive" and "think ahead" in order to do his job completely is explained as follows:

"The reporter who makes an interesting and fair report of a trial has a more difficult task than the reporter who prepares a mere speech report; his work is not simply the taking of notes and verbatim testimony to be made into a news story. In the first place, he should familiarize himself thoroughly with the case before it comes to trial. By reading the newspaper reports of the crime and the investigation which followed it, and by conversing with attorneys on both sides, he obtains a clear conception of the issues and some understanding of the character of the principals. Consequently, as the trial proceeds, he understands the significance of the attorneys' motions and of the evidence and has an idea of what is to follow. He is, therefore, not wholly unprepared when certain startling disclosures are made in testimony, and he knows what emphasis to give to them. By consulting with attorneys during recesses of the court he can learn some facts which are worth advance notice of the trial. Whether or not the defendant will testify, whether or not a 'surprise' witness may be introduced, what instructions to the jury each side will ask the Judge to make, whether or not certain attorneys will withdraw—these are a few of the things to be reported that are not revealed in the testimony of witnesses. . . .

"The reporter should also try to divide the principal issues during the early part of the trial in order to make them clear to the reader after the testimony has revealed them. For example, the innocence or guilt of the defendant frequently turns upon identification of the person who actually committed the crime and it is incumbent upon the reporter to report carefully the evidence of identification and the defense or alibi; or the issue turns upon some circumstance, such as proof and denial that the fatal bullet was fired from the defendant's gun; or the issue turns upon motive, making it necessary for the reporter to identify clearly the persons who testify as to the actions and conversations of the defendant and his connection with the victim or the victim's wife, or sweetheart, or husband, or brother."

A careful report of the Judge's instructions is recommended, but the attorneys' summations stand upon a somewhat different footing, as witness the following extract:

"Portions of the attorneys' summations are usually included in reports of trials. In order to be fair, the reporter ought to divide the space nearly equally between the two sides. In some trials much of the summation is the sheerest kind of falsehood; it sometimes contains obviously illogical inferences and even aspersions upon the reputation of upright citizens who were witnesses. Because the summation represents lawyers' conclusions and not facts, the reporter can often serve the public interest by exercising a censorship upon some of the statements and conclusions except where he believes that publication of them will inform readers of the insincere character of defense or prosecution adopted by the attorneys."

On the not unimportant question of "The Reporter's Relation with Jurors" Mr. Bush says:

"Usually it is against the public interest for reporters to interview jurors in regard to their verdict after it has been reported to the court; for jurors, after rendering a verdict, ought not to be subjected to threats or insults as a result of publication of their secret deliberations. Sometimes, however, no harm comes from the practice of interviewing jurors in regard to their deliberations after they have rendered a verdict. In a case in which the jury has deliberated a long time and, especially, after a mistrial has resulted, it is important for the reporter, when it serves the public interest, to learn how the balloting stood at various times.

"In no circumstances, however, ought the press to publish stories which tell about the status of juries while their deliberations are in progress, or while a case is being tried in the court room. 'There is no element in the law pertaining to

juries more fundamental or necessary than the principle that the process of their deliberations is absolutely secret.' There have been times when juries required several hours to decide a case in which there was great public interest, and the newspapers, conscious of the fact that the climax of interest had been reached, have tried to sustain interest by reporting the supposed secret deliberations of the jury. This practice is against the public interest and ought not to be permitted by the courts. Interviewing jurors during the course of the trial and prior to the retirement of the jury is obviously against the public interest; happily, it is not often done."

The few brief extracts which we have made from the interesting chapter on "Criminal Trials" are supplemented in the book with copious illustrations, drawn from newspaper accounts, which make the points much clearer to the students. On the whole, the lawyer who reads the extracts will find little of which to disapprove and much which he can cordially endorse. That such standards of accuracy and propriety are being taught the young journalists is significant both for the press and the public attitude towards the administration of justice. If criminal trials are to be reported with a due regard for certain dramatic and "news" values, no better method can be suggested than that outlined in Mr. Bush's book. His rules for young reporters are unquestionably based on "things as they are," the recognition of very definite trends of public taste, but they eliminate familiar forms of abuse.

But the young reporters are not to be sent into the world merely with an idea of the journalistic faults to be avoided. Mr. Bush is very strongly of the opinion that "the administration of criminal justice in the United States is in great need of reform," and he suggests a number of things that should be done. They embody in the main the views which a large part of the profession has reached after a careful consideration. The legal reader will be especially interested in the author's unreserved adoption of the view that the photographing of trial scenes by newspapers should be prohibited. Following is a list of all the suggested reforms:

"1. Action by judges, members of the bar, and the police to punish and prevent the bribery and intimidation of jurors, especially the latter.

"2. Action to punish and prevent the perjury and enforced disappearance of witnesses brought about through subornation of perjury and threats of violence.

"3. Legislation to permit the judge in state courts to intervene to a greater extent in the selection of jurors, and to allow the prosecution the same number of peremptory challenges as the defense in jurisdictions where a distinction prevails.

"4. Legislation to permit the judge in his instructions to the jury to comment with greater freedom upon the evidence and the character of the witnesses, as he may do at common law and as English judges do in criminal cases.

"5. Legislation to permit the prosecution to call the jury's attention to the defendant's failure to testify in his own defense.

"6. Correction of the abuse of the right of habeas corpus; to be brought about by judges exercising greater caution in issuing the writ.

"7. Regulation of the practices of professional bondsmen which result in the inability of the state to recover forfeited bail bond and the consequent temptation of criminals to 'jump' bail; to be brought about by the adoption of a regulation to admit no person to bail who formerly has been convicted of a felony, and to forfeit bail bond with more frequency.

"8. Fewer continuances by judges upon application of the defense counsel for professional criminals.

"9. Less recognition by appellate courts of technicalities when the manifest purpose of defense counsel is to cite numerous and unimportant exceptions in an effort to obtain reversal.

"10. More severe sentences for defendants convicted of receiving stolen goods.

"11. More dignity in the courts upon the part of the judge, attorneys, clients, and spectators, and the prohibition of the practice of photographing trial scenes by newspapers.

"12. The establishment in large cities of local endowed crime commissions to check the records of trials, probations, and paroles of professional criminals, and to publish periodic reports; newspapers cannot perform such an enormous task nor can governmental agencies be entrusted with it.

"13. A determined effort by citizens to divorce politics from the administration of justice by defeating incumbent judges and prosecutors who have improper relations with professional criminals.

"14. Greater efforts by local bar associations to debar crooked attorneys who specialize in criminal practice.

"15. The exercise of greater caution by judges in admitting to parole professional criminals; to be brought about by a closer examination of the defendant's record by the judge and the district attorney.

"16. More drastic laws to confine professional criminals convicted of several felonies.

"17. Reform of the practice of permitting expert witnesses to testify for one side or the other in cases in which insanity is offered as a defense; to be brought about by the appointment of one or more experts by the court as the court's witnesses or as officers of the court.

"18. Bestowal of more power upon the District Attorney in some jurisdictions to permit the institution of criminal prosecution by means of the information process, and the divorce of the office of District Attorney from politics."

It is well that young men going into a profession which exercises a great influence on public opinion should begin their careers with such sound and definite ideas of what is needed to improve the administration of justice. It tends to reduce the area of the influence of mere "curbstone" opinion.

Opinion No. 14 of Committee on Professional Ethics and Grievances

Witnesses in Civil Cases: Obtaining statements from witnesses whose names were furnished by opposing attorney.

A member presents the following question:

The attorneys for an indemnity company, while defending a suit against one of its policy holders for personal injuries, arising out of an automobile accident, requested the plaintiff's attorney to furnish them with the names and addresses of the plaintiff's physicians and their request was granted.

Was it proper for them thereafter to endeavor to obtain written statements from those physicians setting forth the plaintiff's injuries, the history of the case and prognosis?

The Committee's opinion was stated by Mr. Hinkley:

The Committee sees no impropriety in the conduct of the defendant's attorneys in having obtained the physicians' statements under the conditions stated. They adopted the proper course in submitting the request to the plaintiff's attorney. The plaintiff's attorney was under no compulsion to comply with the request and when he did so must have understood the request itself to imply an intention to obtain information from these witnesses. Such information may be important in enabling the defendant to ascertain the extent of the plaintiff's injuries and to arrive at a just measure of damages for a settlement; or, if the case goes to trial, to furnish the basis for an intelligent cross examination and for the comparison of the testimony of the plaintiff's physicians and the defendant's physicians as to the prognosis of the injured party's injuries.

DEPARTMENT OF CURRENT LEGISLATION

Extending State Jurisdiction by Act of Congress

By Alphonse A. Laporte and Frederick D. Leuschner

THE recent approval by President Coolidge of the Hawes-Cooper Act to divest articles produced by convict labor of their interstate character marks a notable achievement in a struggle more than a quarter of a century old. The problem of state prison officials both to occupy and support their convict charges has been settled in most of the states by the erection of factories for the production of such commodities as clothing, furniture, brooms or twine, or by contracting the labor of the convicts to independent producers at a rate of pay so small that the goods could be placed upon the market at such a low figure that similar goods produced by free labor could not compete. The situation was further complicated because the states were powerless to prevent the flood of convict-made goods from pouring in from sister states due to the prohibition laid by the Constitution against state interference with interstate commerce.

Thus the earliest attempt by the State of New York[1] to meet the problem, by requiring goods made in the prisons of other states to be labelled "Convict Made" with the year and name of the prison, was held unconstitutional as a direct violation of the commerce clause.[2] In an effort to meet this objection the legislature extended the labelling requirement to cover goods made in the prisons of New York.[3]. This statute met with a similar fate on the same ground. Another approach is illustrated by an Ohio statute which required a license fee of $500 annually from merchants selling foreign-made convict goods, with a $5,000 bond for the faithful performance of conditions requiring detailed reports of all sales. The Ohio Court held the act invalid, indicating its opinion that only if Congress permitted the states to act, could interstate commerce in prison-made goods be regulated.[4] In the face of such judicial decisions the need for federal remedial legislation was clear. The evident remedy was action under the commerce clause.

Two possible courses of action were open to the national legislature. It might decide that it was a fraud on the public to sell prison-made goods unbranded, so that individuals who might object to patronizing prison manufacturers could not distinguish the shirts or brushes or brooms they did not want from the products of free labor. This was the system adopted in the Pure Food and Drugs Act,[5] and in the acts prohibiting the transportation interstate of foreign animals and birds, of dead wild animals, birds,[6] and black bass,[7] where they were shipped in violation of the conservation laws of the state where they were killed or the interstate journey began. Or the Congress might refuse to pass on the right or wrong of deceiving the public, and simply divest prison-made goods of the protection of interstate commerce, permitting the state laws to act upon them before they become merged in the general stock of goods in the state.[8] In the pre-prohibition period this use of the power over commerce recommended itself to the law-makers in dealing with the problem of prohibition. Liquor was considered as a legitimate article of commerce in some states, illegitimate in others. Congress did not want to take sides on the prohibition question, then a local issue, but did believe that the federal protection of interstate commerce should not permit a flagrant breach of state police laws.[9] The opponents of prison labor contractors followed the model of the liquor laws. As early as 1909 a bill on prison labor similar to the Hawes-Cooper Act was introduced, and the long fight ended only at this session.

Opposition to the bill before the Committee of Congress was mostly confined to prison officials of states having the contract system, or the public account system. Under the former the labor of a prisoner is leased to a private individual or corporation which pays for it a price far below the price paid for free labor and receives in addition either free, or almost free, rent, light, heat and overhead. Under the public account system the state operates the prison industries, furnishes the raw materials, and sells the product in the general markets either directly or through an agent. The latter system was evolved to replace the contract system because of the general objection on the part of prison reformers that the prison contractor, profiting from both the state and the prisoner, was an undesirable factor in the prison problem. It is significant, however, that no opposition to the bill proceeded from states having the state-use system, under which the products of convict labor are diversified with a view to the needs of state institutions, the thought being that under proper surveys and under proper diversification of industry in the prisons the output of the penitentiaries will meet the needs of the institutions of the state. An example of such a system is that of the New York prison law requiring the prisons to manufacture products required by the state or its political subdivisions, or public institutions, and to prepare materials needed for the construction of highways.[10] This principle has been extended to contractors by the device known as the states-use plan, whereby the products of a prison in one state may be sold to the institutions of others, the industries of the manufacturing state's

1. Laws 1894, c. 698.
2. People v. Hawkins, 85 Hun 43 (App. Div. 1895).
3. Laws 1896, c. 931.
4. Arnold v. Yanders, 56 Ohio St. 417 (1897).
5. 34 Stat. 768 (1906), 21 U. S. C.
6. 35 Stat. 1137 (1909), 18 U. S. C. Sec. 392.
7. 44 Stat. 576 (1926), 16 U. S. C. Secs. 852, 854.
8. A combination of both the prohibition and divesting methods is seen in the Plant Quarantine Act, 44 Stat. 250 (1926), 7 U. S. C. Sec. 161, which prohibits or restricts the transportation of diseased nursery stock, where the state into which they are being brought declares the disease exists in the state whence the stock came. To cover the situation which may arise if, despite the prohibition, diseased stock is imported, the statute divests such stock of its interstate character in the same manner as is done with respect to prison-made goods by the present act.
9. 26 Stat. 313 (1890).
10. N. Y. Prison Law, Secs. 171, 183.

prison being diversified to meet the requirements of the near-by states. Such a diversification takes into consideration not only the needs of adjoining states but also the proximity of raw materials and the employment of prisoners in each state in such industries as will prove most beneficial to the prisoners upon their parole or release.

Public No. 669 reads:

"All goods, wares, and merchandise manufactured, produced, or mined, wholly or in part, by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal and/or reformatory institutions, except commodities manufactured in Federal penal and correctional institutions for use by the Federal Government, transported in any State or Territory of the United States and remaining therein for use, consumption, sale, or storage, shall upon arrival and delivery in such State or Territory be subject to the operation and effect of the laws of such State or Territory to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in such State or Territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise.

"Sec. 2. This Act shall take effect five years after the date of its approval."

This language is identical with that of the Wilson Act[11] with two minor differences in that the latter act did not include the word "delivery" in the phrase "upon arrival and delivery" of the instant act, and designated the laws of the states which were allowed to operate as those "enacted in the exercise of its police power." It will be remembered that the purpose of the Wilson Act was to remove the bar of the commerce clause so as to allow "imported property to fall at once upon arrival within the local jurisdiction."[12] In sustaining the constitutionality of the Wilson Act the Court held that it allowed the state law to operate upon packages of imported liquor before sale,[13] however, not upon arrival at the state line, but only after its arrival at its destination and delivery to the consignee.[14] The colossal mail order liquor business from wet into dry states grew up which, following the Rahrer Case, necessitated the passage of the Webb-Kenyon Act[15] in order to prevent the receipt of liquor by the original consignee. As a result of the Wilson Act and state prohibition laws, direct out-of-state purchase was the only legal means of securing the wherewithal to satisfy the impulse to take a drink, but the proponents of the convict-made goods measure do not feel that there will be any need for a statute resembling the Webb-Kenyon Act. While it is still possible for a person to have such goods sent him for his own use, the proponents of the measure count on general objection to using them, and furthermore, other shirts and other brooms may be purchased lawfully within the state. Indeed the great complaint made by all vendors of prison-made goods has been that labelling statutes effectively kill their business because the public will not knowingly purchase the goods.

The constitutionality of the Hawes-Cooper bill was attacked in the Senate on the ground that convict-made goods are not deleterious in character, that one experiences no more evil effects from wearing a shirt made in a prison factory than from wearing one made by free labor, while on the other hand liquor has always been an outlaw. Hence the Wilson Act could be sustained as a liquor police measure while this act cannot. It is significant, however, that while the peculiarly evil character of liquor was given as a ground for sustaining the exceptional power of regulation exercised by the Webb-Kenyon Act of 1913 it was not adverted to by the Court in sustaining the Wilson Act of 1890.[16] In attacking the constitutionality of the former it was argued[17] that earlier cases had established a class of interstate commerce which required uniform regulation, that liquor belonged to that class, and hence to permit its regulation to assume the form of prohibitory action by the states laid the basis for subjecting interstate commerce in all articles to state control. The answer of the Court to this last resort, in terrorem argument, was that the exceptional nature of the subject regulated was the basis upon which the exceptional power must rest, a reply which would serve equally as well to meet a similar contention levelled against the present statute. Such an objection might also be met by answering that, if there be such a classification, convict-made goods do not fall within it, and that the identical device of divesting certain goods of their interstate character has been used before in the case of game birds and animals.[18]

There is no novelty in the proposition that the police power of the states may be permitted to operate even when Congress by its silence has not indicated its will that the field shall remain unregulated by the states, because the Court has felt that the cases were so clearly ones calling for the exercise of the police power that states might act without permission by Congress. Thus state police regulations were held applicable to shipments of diseased cattle in interstate commerce,[19] and to oleomargarine misbranded as butter.[20] The parallel between misbranded oleomargarine and mislabelled convict-made goods is too close to require comment. The Wilson Act, the Lacey Act, and now the Hawes-Cooper Act indicate not a new departure in constitutional theory, but an application of the doctrine applied long ago in Cooley v. Board of Port Wardens,[21] where the Court sustained an Act of Congress of 1796 authorizing the states to pass pilot laws applicable to interstate commerce, though the act expressly permitted state legislative action upon a subject matter which was largely interstate commerce.

It is interesting to note that the act provides that it is not to take effect until five years after its approval. As originally introduced it contained no such limitation, but a two-year provision was inserted at the suggestion of individuals who favored the principle of the bill but were anxious for time necessary to solve the practical problem in their own states of investigating and reorganizing their prison management so as to meet legislation which will undoubtedly result in states into which the former now ship their products. From an abundance of caution this provision was lengthened upon its passage in the Senate from two to five years and this change was agreed to by the House. This period would seem to be ample to permit of making the necessary prison economic adjustments and of enacting appropriate legislation in order to make use of the federal act. Apparently confident that the federal act would be passed by the Seventieth Congress, in view of its having passed the House three times be-

11. Supra note 9.
12. Wilkerson v. Rahrer, 140 U. S. 545, 564 (1891).
13. Ibid.
14. Rhodes v. Iowa, 170 U. S. 412 (1898).
15. 37 Stat. 699 (1913), sustained in Clark Distilling Co. v. Western Md. R. Co., 242 U. S. 311 (1917).
16. Wilkerson v. Rahrer, supra note 12.
17. Clark Distilling Case, supra note 15.
18. The Lacey Act, 31 Stat. 188 (1900), 18 U. S. C. Sec. 395, and see Plant Quarantine Act supra note 8.
19. Rasmussen v. Idaho, 181 U. S. 198 (1901).
20. Plumley v. Massachusetts, 155 U. S. 461 (1894).
21. 12 How. 299 (U. S. 1851).

fore the Senate concurred, New York, taking time by the forelock, enacted a statute, 1928, c. 805, requiring the branding or labelling of convict-made goods manufactured "outside of the state" before they are offered for sale within the state. The act also requires registration of vendors of all convict-made goods, without exacting a license fee or a bond for performance of conditions. The omission of the fee and bond are notable, for they were undoubtedly left out because a previous act containing such provisions had been held invalid as an arbitrary exercise of the taxing power.[22] The fact that the act antedates by some nine months the federal enabling act would not seem to be any objection to its constitutionality, since in the Rahrer Case, where the state prohibition law was passed prior to the Wilson Act, the Court found no necessity for its re-enactment, saying that it was a law competent for the state to pass, but one which could not operate upon articles occupying a certain situation until the passage of the act by Congress.

As to the branding provisions the opinion of O'Brien, J., in People v. Hawkins,[23] holding invalid the 1896 New York statute requiring branding of all convict-made goods might be followed. Delivering the opinion for the majority of the court, but speaking only for himself on this point, he expressed the view that such an exercise of the police power was unconstitutional since it interfered, without due process of law, with the right to acquire, possess and dispose of property, and with the liberty of an individual to earn a living by dealing in the articles. Another view which might be taken with reference to the 1928 New York Act is that by requiring the branding only of convict-made goods received in interstate commerce, the legislature discriminates against articles which if made within the state would be admittedly legitimate objects of commerce. This view is suggested by a case decided under the Wilson Act where the Court held that a state recognizing as lawful the manufacture, sale, and use of intoxicating liquors under a state dispensary system could not discriminate against liquor manufactured in other states by allowing its purchase only through state agents.[24] The discrimination involved in that statute was held to be a violation of the uniformity of regulation required by the commerce clause, though it would seem that the same result might be reached by invoking the equal protection clause of the Fourteenth Amendment. However, the discrimination difficulty may be easily avoided by states which, like New York, employ all their own convict-made goods for state use.

22. People v. Raynes, 136 App. Div. 417 (1910).
23. 157 N. Y. 1 (1898).
24. Scott v. Donald, 165 U. S. 58 (1897).

JUDGE AND JURY

Time Has Come When Public Should Be Informed Regarding Great Mass of Work That Is Being Well Done by Our Judiciary—Jury System Not a Failure—Need of a Strong, Learned, Experienced, Fearless Judiciary, Entrusted with More Power Over Juries and Their Decisions*

By Hon. Frederick E. Crane
Judge of the Court of Appeals of the State of New York

IN addressing lawyers and judges, one is talking to a specially trained class which looks at things from the same viewpoint. However divergent may be our opinions on various subjects of the law, we at least are fairly familiar with its objects and its purposes and the results accomplished through the work of the courts. However numerous may be the members of our profession, the class is small indeed compared to the rest of the population in any city or state. What do these people who are not lawyers and judges think of us? What do they think of the work that we are doing? What is their opinion of the courts?

If we are really desirous of an accurate answer to these questions, we must put another. Where are we to go to find out what the public thinks? Who or what is the mouthpiece of public opinion? We may ask our friends and acquaintances. If we do, we take their criticism in good part and laugh at their ignorance. If we turn to our secular magazines, we find condemnation and never praise. We may search the daily press in vain for any news regarding the extent and importance of the work done by lawyers and judges. Daily we may read of peculiar antics of some member of the Bar or of some weak judge in a sensational case. We have continually served up to us, and I hope for our good, the weaknesses and defects of our Criminal Procedure. The failure of juries to find verdicts in accordance with public sentiment meets with public condemnation in the press, and we hear much about archaic procedure and the delays and failures of the law. More than this, whenever judges or lawyers have occasion to make addresses to those who are not of the profession, they are very apt to criticize instead of instruct, to denounce instead of commend. The fact is that the public is served from almost every source with misleading information, and given a wrong idea altogether of the value of the profession to the community as a whole. Is it any wonder that the public have a general idea, a sort of impression which controls their thought and speech, that law is in a state of collapse, and needs radical reformation?

Every day in the year, barring Sundays and

*Address delivered before the judicial section of the Ohio State Bar Association at the mid-winter meeting held in Cleveland.

holidays, hundreds and thousands of judges from the humblest magistrate or justice of the peace to the highest court of the states and the Supreme Court of the United States are hearing the causes of the people and settling their difficulties speedily and well. I have no doubt that it would be a surprise to a great many people in Ohio if they really knew the amount of work done by the judges and the disposition of legal matters by a diligent Bar.

The other day I had occasion to gather a few statistics regarding the work of the courts in the past year in New York City. In the Supreme Court, which is the trial court of our state, for the counties of New York and Kings alone, which does not include the entire city, 40,000 cases were disposed of and finally determined. In the Municipal Court of the city, which corresponds to the court of the Justice of the Peace, over 265,000 cases were tried and decided; and in the General Sessions, which is a criminal court for the trial of felony cases, in the Borough of Manhattan alone 8,000 indictments resulted in verdicts of guilty or not guilty. We hear nothing at all about this sure and steady action of the law, preserving in the main the security of life, liberty and property.

When I had occasion to say the other evening in New York that there never was a time when the law was so efficient and our systems so well administered, when judges and courts worked so well, one of the leading periodicals had this to say in criticism of my address:

> "The difficulty is that the general public does not understand or believe the statement just made, or any part of it. In such matters the public depends for most of its information and enlightenment upon the daily newspapers, but few of the editors of these or the reporters are informed concerning the philosophy of law. The result is that the public is too often misinformed and misled. There is in fact an entire lack of cooperation between the professions of journalism and the law. It has seemed to us," continued this paper, "to be the duty of the legal profession to make renewed efforts to improve so deplorable a condition, certain of the phases of which tend toward public disrespect not only for the Bench and Bar, but for the entire body of our laws."

I call these matters to your attention merely to emphasize this one fact: The time has come when the public should be informed and instructed regarding the great mass of work which is being well done by our judiciary throughout this country, and of the importance of this work as a branch of government for the welfare of the people. They should also be informed of the purposes and limitations of the law so as not to expect from it those results which it was never intended to accomplish. Law is rough business at the best, and can never be a substitute for morals, religion, art, culture or science. It merely makes straight the road and safe the highway for the coming of these better influences. Even intelligent people expect too much, and know too little of the law.

May we not pause, however, to consider for a few minutes some of these censures which have been heaped upon our profession of late? The jury system has come in for more than its share of abuse. Because some defendant in a spectacular case has not been declared guilty by a jury of twelve men, the public and the press immediately cry out that our system is archaic. The fact that such a defendant is brought to trial, pilloried in the eyes of the public, scorned by associates, and probably ostracized for the rest of his life from his former companions is considered as nothing. The mere fact that a zealous and earnest public prosecutor drags such a man before the bar of justice, shows up his life and his nefarious activities and weighs him in the balance for the judgment of twelve men, is in my estimation in itself a bitter ordeal, irrespective of the judgment of those twelve men. The mere fact that we have stern but fair judges, competent and able prosecutors, and the means to thresh out in the open the secret doings of crime, is a deterrent and a terror far beyond our ability to estimate. Probably the greatest victories which our Navy has ever won have been the things which it prevented from happening. The principal thing is to have a great and fearless judiciary; a courageous, energetic prosecutor; twelve men in the jury box and a wide-awake press. Given these functions, the results for good are tremendous. We are apt to place at times too much emphasis upon a sentence of a court as the real punishment. I have known many cases where exposure was the dreaded punishment and the incarceration in prison a relief.

But the jury system is not a failure by any means. It is far superior in its results to any other method.

There is no better or healthier system I know of than to have disputed questions of fact, both in civil and criminal cases, passed upon by ordinary citizens of ordinary intelligence. These men who compose the jury are much more apt to be conversant with affairs and with the burdens, responsibilities and hardships of daily life than a secluded and exclusive judiciary. The law can never be framed so as to reach every case. The English language is not capable of expressing all exceptions. There are lights and shadows which can be seen and yet not perfectly expressed. The law is more or less rigid and the jury, being human beings, with all the feelings that the rest of us have, give to the law an elasticity which to my mind saves our legal institutions. Their verdicts are illogical in many instances, and perhaps contrary to the evidence, but in the vast majority of cases they see through sham, fraud and deceit or fake claims and defenses and try to do the right thing. While we are decrying the jury system, other nations are adopting it. It is finding a place in those countries whose codes of procedure are based upon the Roman law. A Japanese accused of a capital or other serious crime now has the right in his own country to demand trial before twelve good men and true. The law was adopted to take effect October 1, 1928. Japan's action adds another nation to the lengthening list of countries that have welcomed the jury system. Trial by jury now thrives over two-thirds of the land area of the world.

No man has had a larger experience with juries than Lord Birkenhead, the one time Chancellor of Great Britain. In his "Life, Letters and Reminiscences," he has this to say:

> "The traditions of English jurisprudence, the methods of criminal trials, are the admiration of the world. They depend upon the broad and simple principle that what twelve ordinary men think of the facts is on the whole more likely to be right than a very highly instructed legal functionary. The liberties of England require to be construed, where the issues are those of fact, not by technical persons very highly instructed, but

by ordinary men who lead ordinary lives and think ordinary thoughts of ordinary people."

That the trial of the facts by a judge without a jury would not be at all satisfactory may be gathered from what Mr. Justice Miller of the United States Supreme Court had to say in an article in the American Law Review of November, 1887. "In my experience in the Conference Room of the Supreme Court of the United States, which consists of nine judges, I have been surprised to find how readily those judges come to an agreement upon questions of law and how often they disagree in regard to questions of fact, apparently as clear as the law." Professor E. E. Slosson of Columbia University, a scientist, looking at this subject from a different viewpoint from the lawyer, tells us in his book, "Keeping Up With Science," that the jury is our last vestige of pure democracy.

A democracy should be very slow in abolishing the jury and leaving questions of fact to judges, who are apt to be bookish men. Millions of dollars change hands daily because someone has not measured up to the care of the reasonably prudent man. The jury determines what care a reasonably prudent man should and would exercise in a given case. These men constituting our jury, engaged daily in the active pursuits of business, traveling all over the city and country, in and out of subways, elevators, factories, machine shops, know more about the care usually exercised than a judge whose days are spent in more peaceful pursuits.

Let me caution you, therefore, to think twice; deep, long thoughts, before you seek to abolish a system which was so deeply rooted in the hearts of our forefathers, that for criminal cases they embedded it in the constitution.

The composition of our juries, however, could be very much improved. The jury system is all right, but its effectiveness has been materially weakened in the selection of jurors. We have placed a premium upon ignorance and excluded intelligence. The best and wisest men in our community have been incapacitated by law. Our courts are made up for the most part of judge and jury. We demand bright and able judges, but annex to them, as part of the court function, uninformed and uneducated jurors. Millions of dollars, life and liberty are disposed of every week by juries. We realize the importance of the jury and then apparently do everything to debilitate and weaken its action. I have reference to those exemptions from the jury service created by law and which I suppose exist to some extent in every state. There should be no exemptions. In New York, for instance, we exempt all clergymen, physicians, surgeons, lawyers, professors and teachers, editors, writers, artists and reporters on the daily newspapers, persons employed in glass, cotton, linen, woolen, iron manufacturing business, conductors and engineers on railroads, telegraph employees, persons who are serving or have served in the militia, members of fire companies or who have been discharged therefrom. Whom have we left?

I ask you in all fairness, what can we expect of a jury, when the men of energy and force in our community are kept out of the jury box? Why should any man be excused by law from serving on the jury any more than he should be excused from serving his country in time of war? Service is honorable and is as necessary in time of peace as in time of war. Nothing is more important than the doing of justice. Is there no patriotism in time of peace? Is it not as important to maintain a government as it is to save it? What nobler task can a man perform than sitting in judgment upon his fellow man? Our democratic form of government is dependent upon such service. Will our citizenship fail us? No, indeed, it will not, provided the public understand the importance of jury duty. The civilization of our time is measured by the justice administered in our courts under our laws. I leave it to you if it be not a correct statement that most of the criticism, if not all of the criticism, of our jury system has come from those, such as newspaper men, ministers and magazine writers, who never serve on the jury and who do nothing in a practical way to improve it. Away, I say, with all exemptions and leave to the discretion of the judge the convenience or the necessity of individual service.

Then, too, in my state we have what has been called a "blue ribbon jury," or those who are set apart for important trials because of their supposed superior intelligence, learning and position. Most of such laws have been passed for the purpose of exempting a favored few from being called for ordinary cases, or from serving at all. Such a distinction is un-American and undemocratic, and should not recognized in the transactions of our legal business.

My main purpose in speaking of our jury system, however, has not been to emphasize its importance so much as to lay stress upon the functions of the judiciary as part of that system. There seems to be a prevailing opinion in some parts of this country that the jury is a body separate and distinct from the judiciary, and that it is to function as a separate, independent arm of the law. The idea, which is the basis of all jury trials, that the court is made up of judge and jury, has not sunk very deep into the minds of some people. For some reason, laymen and lawyers have conceived the notion that the jury and the judge are antagonistic and that to produce the best results the judge must be suppressed and weakened. My plea here this afternoon is for a stronger and more powerful judiciary, upon the basis that no jury properly functions without the guidance of an intelligent, learned, painstaking judge.

It has been proposed, in fact, it is the law in some states, that a judge must submit his charge to counsel before they sum up. Federal judges, like the English judiciary, have always had the authority to express their views of a case to the jury, leaving the jury as the ultimate judges of the fact. The Caraway bill, introduced in Congress, proposed to make it reversible error for the presiding judge in a United States court to express his personal opinion as to the credibility of witnesses or the weight of testimony. About this particular bill, I have no comment. It is the tendency of the thinking of the people and of the Bar with which I am dealing, of which this bill is only one manifestation. Why is it that the Bar or the people are so fearful of the influence of the judge with the jury? Some magazine articles have gone so far as to condemn a judge for having any opinion at all about a case tried before him, as though he were

less than a man, a mere figurehead without nerve or backbone, a mere onlooker at a fight. There is a tendency throughout the land manifested in some quarters, to drag down the judiciary to this low level. Certain things lend impetus to such a movement. The folly of the recall of judges was a blow aimed at an upright and fearless judiciary. The direct primary for judges did much in my state for a while to lower the prestige of the Bench. Candidates for election or reelection were drawn into active politics, like men running for an aldermanic office. We soon saw our mistake, and took the judiciary out of the direct primary.

Small and inadequate compensation has either kept good men from the Bench or driven able judges back to the Bar. Short tenure of office has not encouraged judicial careers. Men are unwilling, with advancing years, to take the chances of repeated elections. The people are the losers, for experience and age are as necessary to the Bench as virility and enthusiasm. Our whole judicial system, whether state or federal, is really dependent upon men who are willing, and who are afforded the opportunity to select judicial office as a career. On the Continent, as we all know, a man is trained for a judgeship as he would be for a lawyer or for a doctor, and having once become a judge, he remains a judge, as a separate and distinct calling. Both in England and in Massachusetts, tradition prohibits a judge from again practicing law.

This nation, including all our western and southern states, has far outgrown the development stage. We are upon a new era, where learning, experience and temperament are as necessary for judicial work in the west as in the east, in the north as well as in the south. If we are to have an efficient judiciary throughout all the states, to my mind, it is necessary for us to have also more uniformity in judicial office and methods of procedure. We find uniformity necessary in much of our substantive law. Outside of a few local conditions, the law is about the same in every state, and the desire for justice as we understand it, is as keen in one section as in another. The point of this is that for the proper working of our *jury* system, it is necessary to have a trained and experienced judiciary in whom the Bar and the public have confidence and to whom they are willing to entrust power, knowing that it will be wisely used.

How important it is that a judge should be able to select the few important questions which should be submitted to a jury; how necessary it is that he should make those questions very clear, using language which everybody can understand, I am sure we all appreciate. How necessary, also, is it that he should have the respect of the Bar and be able to control and at times suppress the lawyer. In other words, the judge should know his business, and he can not know it out of books alone; he must have had a wide experience with affairs, with people, with government, with the courts. Let us never forget that to be a good judge one must know more than the law in the books; he must know also how to apply it wisely. Learning and wisdom do not always go hand in hand.

We can never devise any system, whether it be recall, direct primaries, or short tenure, which will take the place of personality or give us a real live man. I use this word "personality" to include all those qualities which go to make a great jurist. It is an individuality which defies description. Probably the best place to find such a man for judicial work is among the leaders of the Bar; men tried and known by constant contact. In one way only can we get such men to take and hold judicial office,—by making it one of power, of influence, of honor and of continuity. To go upon the Bench but for a short time and then to go back to the Bar, while necessary perhaps in some instances, has the tendency to make the Bench a stepping stone to a practitioner's career or a mere means of advertisement.

We have done something in New York State which I think has been of benefit to the Bench. You will pardon me for referring to my state. I do so in no spirit of comparison and with no suggestion of emulation. I simply give you the facts, and let you draw your own conclusions. The salary of the judges of the Court of Appeals of the State of New York, which, as you know, is the highest court in that state, has recently been fixed at $25,000 a year. The tenure is fourteen years. The judges of the Supreme Court, which is the trial court, and of the Appellate Division, which constitute the intermediate appellate court, receive $22,500 in the city of New York and $15,000 in other parts of the state. The tenure here is fourteen years. The term of the County Court judges and that of the Surrogate has recently been extended to fourteen years. Recognizing that many of the judges, even with this long tenure of office, left the Bench to resume practice as they approached advancing age, the state has also extended the pension system to include the judges. Out of his salary he pays in so much a year, and may retire at any time between sixty and seventy, and must retire at seventy. The amount of his pension is figured in seventieths. One-seventieth of his salary is multiplied by his years of public service for the state in any capacity. There has also been established the Official Referee System. A Supreme Court judge retiring at seventy may be appointed an Official Referee for the rest of his life. For this he is paid a salary and provided with an office. He sits to hear such cases as are generally sent to a Referee, mechanics' liens cases, uncontested divorces, disbarment proceedings and the like. These may be referred to him by the courts.

Some such system also applies upon the retirement of a judge of the Court of Appeals, who may take his pension or become an Official Referee to hear cases in which the state is involved.

You will agree with me, I am sure, that the State of New York has treated its judiciary liberally, with the purpose of strengthening the office and attracting to it the best brains and skill.

All that I have said here this afternoon has but one object in view. It is to impress upon you and upon all who may hear or read my word, the necessity of a strong, learned, experienced and fearless judiciary, entrusted with more power over juries and their decisions. To have such a judiciary, it is necessary to draw to the Bench the leaders of the Bar. To get such men, it is necessary to pay a living wage and open to them the opportunity of a useful and continuous judicial career, which means, of course, the opportunity for public patriotic service.

Scenes In and Around Memphis, Association's 1929 Meeting Place

(1) Magnificent Auditorium at Memphis, Tennessee, seating over 12,000, in which Association's meeting will be held next October. (2) Beautiful doorway of Court House in Memphis. (3) A bit of local color. Photos, courtesy of Memphis Chamber of Commerce and Memphis Committee on Arrangements for Annual Meeting.

FEWER LAWYERS AND BETTER ONES

Too Many Young Men and Women Are Being Admitted to the Bar and Too Many of These Lack the Necessary Background of Ethics, Culture and Education—Overcrowding Due to Encroachments on the Lawyer's Legitimate Domain and Enormous Overproduction of Lawyers by Law Schools — Concrete Suggestions*

By I. Maurice Wormser

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THERE is nothing novel about the feeling of so many thinking people in every age that current conditions require reform and correction. It suggests the old poem:

"My grandsire from his house of logs,
Declared that things were going to the dogs.
His grandsire viewed the world's worn cogs,
And thought that things were going to the dogs.
His grandsire in his queer skin togs
Was sure that things were going to the dogs."

The alarm we feel now a-days about the veritable hordes of untrained young men with lack of cultural background entering the legal profession is as old as the United States itself. John Jay, who wrote most of our State Constitution and who became the first Chief Justice of the Supreme Court of the United States, came near being refused admission to the Bar in New York City because of an agreement among the lawyers of his day, made about 1760, not to take any more students into their offices, not only because they considered the profession over-crowded, but because they did not like the calibre of the young men who were then taking up the study of the law. John Jay's father was about to send him to London to study, when the lawyers were persuaded to amend their agreement. They reluctantly decided to take young men "under such restrictions as will greatly impede the lower class of people from creeping in."

While one must not overlook the obvious moral which adorns this anecdote, it is equally true that every honest-thinking person must agree that today far too many young men and women are being admitted to the Bar and that, in turn, far too many of them are utterly lacking in the background of ethics, culture and education which should be requisite if our Bar is to continue to guide in the handling of the vital affairs of the community. The increase in the number of law students in the six-year period from 1920 to 1926 was over 80%, utterly out of proportion to the increase of population and to the popular demand for legal services. Apart from the vast numerical increase, an entirely too large percentage seem out of sympathy with the traditional ideals of our profession. They seem quite unacquainted with the point of view of Old Pybus in Warwick Deeping's beautiful novel (p. 271): "There's such a thing as beautiful living. The fine gesture, the compassionate gesture. When you come to the end of life such gestures seem worth while." Too many of their gestures are unwholesome and over-commercialized, or, at the best, muddled.

One of the chief obstacles with which reformers must contend is the self-complacent self-pattings on the back by numerous attorneys and judges who feel the Bar is completely perfect and who resent any attack upon the makeup of our profession and who are perfectly sure that all lawyers are pure, learned and upright. The worst of this is that they seem entirely sincere and are not at all disturbed at the fact that practically all of the great metropolitan newspapers differ emphatically.

There are some among us, however, who are cognizant of the real state of affairs and who do not hesitate to speak. The greatest living legal scholar, Dean Wigmore, states that "the number of lawyers should be reduced by one-half," and advocates higher standards and stricter requirements for preparations as the only "rational and beneficent measure for reducing hereafter the spawning mass of promiscuous semi-intelligence which now enters the Bar." But there are some who may say Dean Wigmore comes from Chicago, and that here in New York all is angelic. The record proves otherwise. The counsel for the petitioners in the recent ambulance-chasing investigation in the First Department, in referring to the misdeeds of a large number of practitioners in one very limited field of the law, no less than seventy-four of whom were recommended for discipinary proceedings, said "that these men come to the Bar utterly devoid of the character, the environment, the background and the education to make them fit to be members of the Bar. There must be something radically wrong with a system which permits mushroom law schools to turn out half-baked lawyers by the thousands each year." And the distinguished Presiding Justice of the First Appellate Division, in responding to these remarks, said: "There are serious problems which face us as the result of what we know and what has been told us so plainly that we cannot escape the knowledge very long." In the Second Department the counsel was no more optimistic. He spoke of "the moral bankruptcy of many of the lawyers" who pursued improper methods, and frankly conceded that the methods used by ambulance-chasing lawyers in negligence cases are also employed in many other fields of the law, of which he specified "the solici-

*Address delivered on Jan. 19 at the annual meeting of the Bar Association of the State of New York, held in New York City in January.

tation of criminal cases and of condemnation proceedings."

One of the members of the Committee on Character and Fitness in the First Department, shortly before his resignation, in commenting upon the applicants for admission declared: "We feel that it would be a benefit to the legal profession and to the community to reject a large number," and he added that many of the applicants confer "a general impression of poor quality." Mr. Mellen, a learned member of the local Bar, recently pointed out: "Thousands of young men who look upon the practice of the law merely as a means of gaining a livelihood—a trade—are seeking admission to the Bar." And he stated that this is why too many lawyers become "tricky shysters." A gentleman who recently resigned from the Committee on Character and Fitness in the Second Department said that of 400 candidates certified on one occasion as having passed their Bar examinations, not more than 20% could have qualified for admission if the law is to be regarded, as it should be, as a learned profession. Mr. Nims, the author of Nims on Unfair Competition stated only last month that "for every boy who possesses sufficient ambition and character to develop into a lawyer of principle and loyalty to the best traditions of the Bar, there are trooping through the open gates into the ranks of the Bar many lads lacking in the moral stability, home background, intellectual capacity and education, absolutely essential to them if they are to become efficient and upright lawyers."

Prof. Horack, the adviser to the Council of Legal Education, says, in the November number of the Journal of the American Bar Association, "We are turning into the stream more than its banks can hold," and he adds that "cram" courses enable such a "steadily growing number" to enter an "over-crowded and underpaid profession." In fact, one need go no further than the advertisement pages of the New York Law Journal for proof that the profession is hopelessly over-crowded. The large number of advertisements of law clerks seeking jobs is written evidence which cannot be disputed. But some may say the only fellows who need positions are those who are ill-educated. Again this is not so. The over-crowding is so excessive that in a recent Sunday issue of the New York Times we find, under the heading "Too Many Entering Law Profession Here; Columbia Finds it Difficult to Place Them," the following statement: "So great is the number of graduates of law colleges in New York City and of those who come here from other cities that increasing difficulty is being experienced in obtaining positions. according to a statement yesterday from Columbia University. The number seeking to enter the profession was termed 'excessive.'" If this came from a less authoritative source it might be regarded as exaggerated. I know, as a matter of truth, that it understates rather than overstates the fact. Young men are willing to serve clerkships today in reputable offices without compensation. Young men who already have been admitted to the Bar advertise they are agreeable to work gratis in order to obtain any opening. Lawyers are literally besieged by applicants for positions. The better known are driven to desperation by the number and persistency of the youthful legal job seekers.

In passing let me state that the up-state conditions, of course, differ materially. Indeed, not a lawyer's shingle hangs in Hamilton County. The District Attorney in that county is not a lawyer, nor is the county judge. When a murder was recently committed there the Governor had to specially designate a neighboring Supreme Court Justice and a neighboring assistant district attorney to hold an extraordinary term of court. My up-state friends, who practice under different conditions, rarely can be brought to realize the seriousness of affairs in the metropolis, where a noted judge recently said to me that the ambulance-chasing investigations though highly meritorious, had only scratched the surface of general conditions at the Bar; that there are many other sore spots for equally vigilant scrutiny, and he specified particularly the solicitation of criminal cases, of condemnation proceedings, and of big bankruptcies, concerning none of which has anything been done.

So much for present conditions. I for one am persuaded that they are far from Utopia; that there is great need for improvement and that, instead of spending so much time on congratulating ourselves on our splendid achievements and our state of sanctimonious perfection, we should spend more time in trying to really improve ourselves.

Now, what lies at the bottom of this condition of affairs? Why is it that the Bar is over-crowded and largely underpaid? Why is it that there are so many job-seekers? Where a condition exists there are always primary causes. To my mind there are two of these, and I shall consider them in order: (a) encroachments on the lawyers' licit domain; (b) the enormous over-production of lawyers by the law schools.

(a) To a large degree the troubles among the Metropolitan lawyers arise from economic causes; or, stated differently, the discontent is an economic one. The lawyer has seen himself slowly stripped of a vast amount of legal practice. Indeed, the practice of law in many fields is no longer a matter for attorneys. Powerful and wealthy corporations boldly trespass upon the licit domain of lawyers. The title companies, the insurance companies, the trust companies, the powerful corporations, are spreading their tentacles around an apparently helpless profession. The defense of negligence suits has been almost entirely taken over by corporations. The handling of wills and estates is no longer the province of the lawyer. Great corporations do 60% of corporate law work. In a reputable Metropolitan newspaper I read, under the heading "Business Service," the following: "Corporations organized, New York, New Jersey, $90; Delaware, $80; includes fees and outfit." Then comes the name and address of the advertiser, not an attorney, for I was curious enough to investigate it. We can almost all of us remember when title searching was the forte of the attorney. Today, except in the rural districts, title searching has passed out of our hands. The prosecution of claims now provided for by the Workmen's Compensation Law, has closed a field of practice formerly open to lawyers. To cap the climax, there have been handed down what I regard as some unfortunate court decisions as to what really constitutes the practice of the law. On top of this, "arbitration"

and "conciliation" have made vast strides. In some important industries, as, for example, the silk trade, litigation is becoming unknown. The illegal practice of law among foreigners, particularly by notaries public and commissioners of deeds, is another encroachment. Last, but not least, we are faced with an ever growing influx of Portias, some of whom are remarkably efficient and all of whom are willing to work for excessively low wages. In the light of all this, can it be doubted that there is ground for economic discontent? Is there any room for question that the lawyers' domain is being lessened? Can any fair-minded person question that the conditions arising from this cause are serious?

(b) While the demand is thus not even stable, but reactionary, simultaneous with the invasion of the lawyers' province is the vast increase in the supply of new lawyers, an increase so overwhelming that the figures will startle if not alarm. The statistics of law school registration in the State of New York for 1926 show a total of 10,302 students; for 1927 a total of 11,186 students. It will be noted that the figure of 10,302 students increased to 11,186 in 1927. The increase in one year was nearly 10%. These figures are taken from the American Law School Review of December, 1927, and are accurate and authoritative. Of the 11,186 students in 1927, all of them, with the exception of 906, were students at schools in New York City. It must also be borne in mind that a large number of young men who intend to practice law in New York are studying law in other states, notably, Harvard and Yale Law Schools, both of which draw a very large proportion of their attendance from this state. In one law school alone in this Metropolitan district there are now enrolled over 1,500 students in the first year law class alone.

Figures presented by the Carnegie Foundation tell the same story. They show an increase in the number of law students in this country, from 24,503 to 45,301, in the period of six years from 1920 to 1926. This is an increase of over 80%. During this same period of years the population increased only 10%. Prof. Horack, the adviser to the Council of Legal Education, states: "There are today about 50,000 persons studying law." I am personally convinced that the total number of prospective New York lawyers now engaged in studying in this and the neighboring states is at least 15,000. As a matter of fact, in New York City, as of June, 1928, there were registered in six law schools far more than 10,000 students, as compared with 6,000 in 1923 and 2,700 in 1916. The recent report of the Supreme Court, Appellate Division, First Department, summarizing the work done by it during the year 1928, shows that there were admitted to the Bar in that one Department, covering Manhattan and the Bronx alone, in one year, 1,020 men and fifty-six women, total 1,076. These figures are nothing short of amazing.

Another circumstance of interest as well as of significance is that the schools with the higher standards are numerically weaker than those with the minimum requirements. The unfortunate tendency, in other words, is to rush to the school whose requirements are the minimum, although another side of this picture is the constant complaint that it is extremely difficult to secure admission to certain schools of high standing.

The counsel for the petitioners in the ambulance-chasing investigation in the First Department referred to the radical error in "a system which permits mushroom law schools to turn out half-baked lawyers by the thousands each year."

Careful attention must therefore be given to the conditions prevailing in the law schools. Are they over-commercialized? Are their standards sufficiently high? Do they propound the correct ideals? Are their students thoroughly trained? Is their growth too rapid to be sound? Is their aim too exclusively confined to pushing their graduates through the Bar examinations?

The law schools are turning out the young lawyers more rapidly even than Henry Ford turned out the old model of the "Tin Lizzie." Lawyers are shooting forth as speedily as meteors across the heaven on a clear July night. Too many of them are utterly lacking in the background of culture, ethics and education, which today is imperative for any real success at the Bar, by which I mean, obtaining the respect of one's fellow-members in the profession and on the bench.

This over-bloated Bar condition, with its blight and sordid ugliness; the many lawyers without a chance from admission; this unbalanced hand-to-mouth, over-commercialized state of things—calls for a remedy. It surely should not be forever the condition of the Bar, which we all love or at least should love. The profession must assume a more worthy place in the sun. Vigorous and genuine reforms must be pressed. "You can't fill pails," as Galsworthy says, "with a teaspoon."

In order to bring about these reforms it is necessary for us to rid ourselves of what Dean Pound calls the pioneer point of view. The cry, "let them all in," "let them all over the bar," the "poor boys" slogan, the *leit motif* of the worthy and honest young man without money—these must be looked at from the right angle. Every lawyer should be qualified to render the proper kind of service not only to his clients but to the community. Mr. Nims has aptly said: "This is a country of equal opportunity, and desirable and necessary as it is that every lawyer should be fully educated and trained for his work, our principles of democracy make the problem of procuring and training men for the Bar one of almost colossal proportions. The preserving of this democratic principle has saddled the profession with one of its greatest handicaps." In order to believe in the principles of democracy, it is not necessary, however, to practice a cult of incompetence. No matter how high the standards are placed, young men of ability, character and perseverance will find it easy to comply with them. The problem must be looked at, moreover, from the standpoint of the community as well as from that of the young man. There will be less barratry and more barristers if better standards are set—more real lawyers and less greedy leeches.

There is a right, moreover, to invoke a remedy. The highest court of Massachusetts, speaking through Mr. Chief Justice Rugg, one of the greatest of living jurists, recently declared, in the *Bergeron* case, that "the right of any person to engage in the practice of the law is slight in comparison

with the need of protecting the public against the incompetent," and, one might add, the unethical.

Now, what concrete suggestions can be advanced with regard to remedy? The fixation of standards for admission to the Bar and for admission to a particular law school are two entirely different matters, as Judge Hiscock has very aptly pointed out. A law school has a perfect right to fix any standards that it desires to, for no man is compelled to attend it unless he wants to. When one comes to the matter of admission to the Bar, the standards ought to be fixed as high as they reasonably can without so affronting common judgment that admission will become a subject for legislative action rather than for the Court of Appeals. The standards fixed recently by the Court of Appeals in a general way are reasonable and satisfactory, but I venture to suggest a number of concrete modifications.

1. As a prerequisite for entrance into any law school beginning with September, 1929, the Court of Appeals will require evidence of the satisfactory completion of two years of college study or its equivalent. We should favor a close definition of this rule so as to require genuine college work done in the college under academic auspices so that the proper cultural values may be attained. In course of time, though not at present, it may be desirable to require a college degree or its equivalent. Individual law schools, of course, may go much further. They might not only require a college degree or the equivalent, but go so far even "as to limit admission to a carefully selected group who are believed fully qualified to do thoroughly satisfactory work."

2. There should be a strict examination into the character, background and environment of applicants for admission to the law schools before their admission, which should be conducted by a responsible committee of the faculty, accountable to the admitting court. Especial consideration should be given to the tragic condition in which too often the young man now finds himself, who, after years of arduous preparation for the Bar, is ultimately disqualified on grounds which might have been pointed out to him at the beginning and thus have saved him years of labor. Hard and fast standards, eliminating all possibility of social or racial discrimination, ought to be made clear and definite so that the student at the beginning, rather than at the end, of his studies knows precisely what they are.

3. There should be a rigid limitation of the number of students permited in any one class in law school. The "hegira to the Bar" would be thereby lessened as well as standards of teaching improved. If classes are too large, the law course tends to degenerate into a mere phonographic operation on the part of the teacher. Indeed, the main argument in support of the case method of instruction is that the teacher may encourage independent thought by the students and employ the Socratic process. But this becomes impossible where the classes are so enormous as to force the teacher to lecture most of the time. Smaller and better schools, rather than inferior and larger schools, are needed. My own experience is that the outside limit in one class should be 100 to 125 students.

4. Every law school, as part of its faculty, should have at least four teachers devoting their entire time to the school, with no practice affiliations. It is all very well to have distinguished names on the law faculty. But the experience of eighteen years of teaching has taught me that the serious work of the school, particularly along research lines, must be performed by men who devote their lives to law teaching and study.

5. The examinations for admission to the Bar should be *both* written and oral. Mr. Presiding Justice Dowling of the First Department has been advocating an oral examination of the candidates by the State Board of Law Examiners for the past two and one-half years. I heartily approve this suggestion, but I do not understand that the Presiding Justice favors the abolition of the written examination. The written examination should not be abolished or curtailed, but should be supplemented by an extended oral examination, much in the manner that applicants for teaching position in the city schools are examined. My experience is that one can size up law students better from oral quizzing than from written examinations alone. When both are combined the best results are obtained.

6. The Committee on Character and Fitness of the admitting court should be aided by the public press so that fuller information may be obtained concerning applicants for admission. Each newspaper should make it a practice to devote space, on the occasions when students come before the Committee, to printing their names and addresses so that the public may communicate with the Committee and give its members any information which may be helpful.

It is impossible to over-estimate the importance of improving the Bar by improving the admission standards in this manner. The subject is a vital one because an over-crowded and uneducated Bar tends to be a weak Bar, a cowardly Bar, and too often a crooked Bar.

Of course, the English system, in many respects, is ideal, but we must be practical, and it is too much to hope for this during our lifetimes. Under that system each law student before he commences his study, is examined by one of the Inns of Court. During his three or four years as a student he must dine not less than six dozen times at one of the Inns, thus giving an opportunity to its members to watch his growth and development, and conferring upon him the great advantage of meeting and knowing the older lawyers. It has recently been pointed out that the average English lawyer has behind him three years at a university, three years of legal study, and three years of apprenticeship in a law office. The English system of justice is universally conceded to be effective. This is largely due, in my opinion, to its superior methods of developing lawyers.

In advancing these suggestions I have not overlooked that "as strange and as discomforting as it may be, mental ability and cleverness do not signify good character." This is unfortunately true. The increase of intellectual standards does not necessarily signify an increase in the moral standards. Knowledge and character do not necessarily go hand in hand. The most abominable crime of the age was committed by a young college graduate who stood at the head of his class and who wore the key which signifies scholarship. While education will not make all young lawyers conscious of their moral and ethical obligations, to deny that better educational methods will help to

improve the standards of the Bar is to deny the value of education itself, which to my mind is a *reductio ad absurdum*. Of course the law schools should place far more emphasis than they do on the inculcation of legal ethics. It is alarming to find that so large a number of the schools fail even to give a course in this vital topic, though the law examiners propound questions upon it at every Bar examination. A knowledge of legal ethics is not inborn. What wiser lesson, for example, can be taught to a young man than the grave error of mixing trust funds or funds which he holds as a committee or receiver with his personal bank account. I have known of case after case where young lawyers have erred as the result of ignorance as much as because their hearts are black. Many will say, "but these things should be inborn," to which the answer is, they are inborn in some people; in others they are not, and too many of the younger men coming to our Bar are unfortunately lacking in the background and environment which carries with it an intuitive insight into the finer points of sound ethics.

The law school also might well lay more emphasis on law as an aspect of economic and social organization. Dean Stone, now a Justice of the Supreme Court of the United States, stated in 1923 that the law schools "have failed to recognize as clearly as we might that law is nothing more than a form of social control intimately related to those social functions which are the subject matter of economics and the social sciences generally." Some genuine attempt, therefore, should be made to teach the law student the business, social, economic and ethical relations of the lawyer and to give him at least elementary instruction in the philosophy of the law. The duty of the law schools should be to make of the student more than a mere technical legal reasoner along technical legalistic lines. The schools should emphasize that the law is a progressive and developing science which must be studied in connection with the other sciences, and in particular philosophy, sociology, ethics and political economy, because these sciences have an inspiring and profound significance to one who realizes that the law is a mirror of progressing life, and not an unchanging parcel of words graven on tablets of stone. For, as Woodrow Wilson well said, "Where life changes, law changes—changes under the impulse and fingering of life itself." To state it tersely, therefore, the law schools, to do their full duty, must take account of science and philosophy, of human culture, as well as of the mere decisions of cases.

There are some who will urge that this is an ambitious program. It is not at all ambitious in the light of current developments. We must, after all, grow more civilized and realize that, as times changes, methods must change. As Mr. Justice Holmes has said, "For most of the things that properly can be called evils in the present state of the law I think the main remedy, as for the evils of public opinion, is for us to grow more civilized." It may even be that the time will come when we will have a graded Bar, permitting one who is admitted to practice only under a restricted license for five years in courts of lesser jurisdiction, and being admitted to full practice only after supervision and scrutiny of his labors during this period. While I would not wish to be understood as presently advocating this, it may become necessary in order to preserve the splendid past of the profession.

Edna Millay says:

> "What from the splendid dead
> We have inherited—
> Furrows sweet to the grain, and the weed subdued—
> See now the slug and the mildew plunder.
> Evil does overwhelm
> The larkspur and the corn;
> We have seen them go under."[1]

1. "Justice Denied in Massachusetts," by Edna St. Vincent Millay, in The Buck in the Snow and Other Poems, pp. 32-3.

This must not happen in the case of the law and of the legal profession.

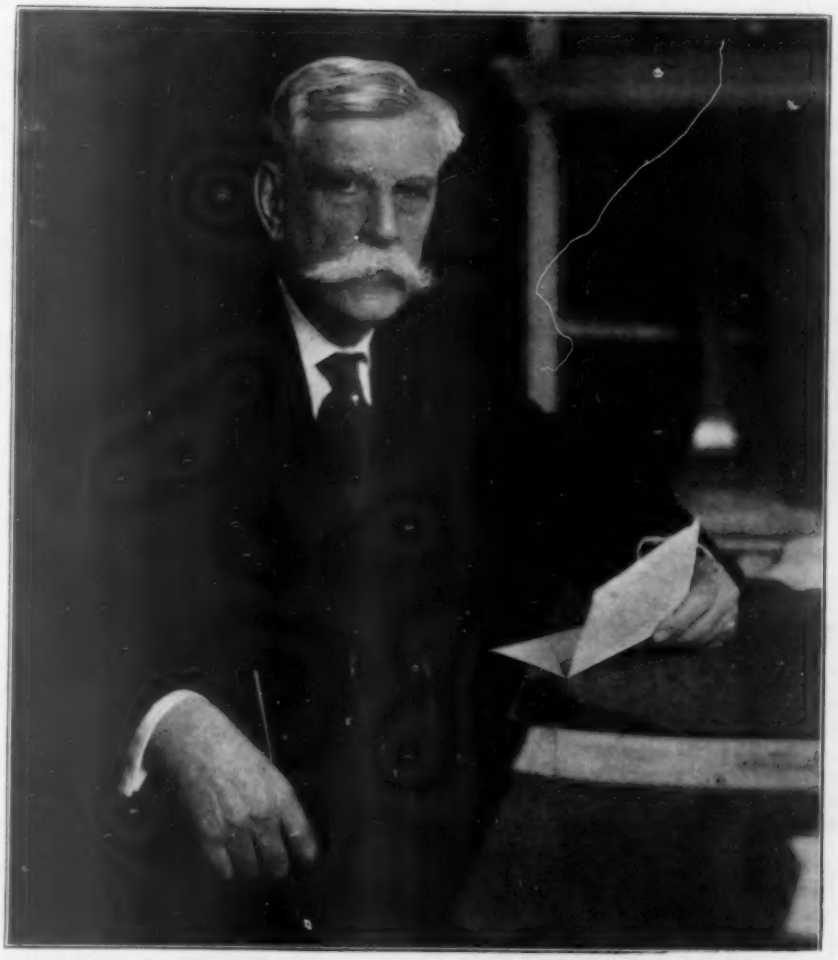
A few words in conclusion. We are living in an age of tumult and unusual change. We are stepping far out of the Nineteenth Century into the fuller life of the Twentieth. Every human institution is being tested and must justify itself in the face of an enlightened and critical community. The rule of reason is being applied fearlessly. The law, of course, is not exempt from such inquiry and challenge. It is not perfect. Indeed, it cannot be perfect. No human institution is or ever can hope to be. We should, however, be interested in seeking to approach a more lofty ideal. To achieve this we must appeal to the young. Youth alone can bring about substantial betterment, for the span of human life is short. Those of us whose faces are turned toward the twilight must be brought to realize the grave necessity of this appeal to Youth, since upon their attainments and achievements the future of our entire legal and judicial process depends.

Our aim, therefore, should be to cause these many young lawyers and law students to realize the great calling they are about to follow; that it is one of the noblest fields for human endeavor; that they must carry on the torch when the time comes for us to relinquish it; that they must live and act "in the grand manner;" that they are a segment of a vast array dating back through the rolling centuries; that they are the emissaries of human freedom and of private rights; that to them comes a heritage which cannot be purchased and which, indeed, is beyond all price; that they must comprehend that Justice is not blind in fact, but simply blind to class distinctions as well as to all considerations of power, race, religion, wealth and politics; that they must conform to the matrix into which the high standards of our great profession have been molded for untold years; that each must hold high and cherish the basic hereditary professional duties of honesty, fidelity, scholarship, courtesy and good will; that each must remember the whole woof and fabric of the great common law of England and this country depend not only on the Bench, not only on the Bar in general, but upon himself, his words and his acts.

If we can teach this lesson successfully—and to it we should dedicate our utmost endeavors—the future of our Bar may be viewed with equanimity. If this lesson cannot be taught, we of the Bar will not escape the rapier thrust and the keen foil of challenge and criticism which today test the mettle of every institution. And rightly so, too, for only through criticism can one attain improvement, and only through improvement can man hope to reach better things. We of the Bar should therefore welcome criticism, not deride it.

EIGHTY-EIGHT YEARS OLD AND STILL ACTIVE

A day before the inauguration of the new President, Mr. Justice Holmes of the United States Supreme Court celebrated his eighty-eighth birthday. He is thus the oldest Justice, by a little over six months, to sit upon that high tribunal. Previously this distinction had been held by the late Chief Justice Taney. In this connection the following comments from the January issue of the Massachusetts Law Quarterly are of interest:



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HON. OLIVER WENDELL HOLMES, ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

"Mr. Justice Oliver Wendell Holmes was born on March 3, 1841 . . . He was appointed an associate justice of the Supreme Judicial Court of Massachusetts in 1882 and chief justice in 1899. In 1902, he was appointed a justice of the Supreme Court of the United States. With a record of forty-seven years of continuous judicial service, he is still apparently carrying his full share of the work of our great national tribunal with a background of extraordinary intellectual experience combined with the imagination and enthusiasm of a young man.

"Those who think that they would like to have an elective judiciary in Massachusetts or in the Federal courts may well pause and reflect upon the question whether the state and nation would have been better off under a system of judicial selection and tenure which would have excluded Mr. Justice Holmes from the bench and from the opportunity for public service which the bench has given him. The Massachusetts and Federal system of selection and tenure has enabled the people not only of Massachusetts but of the whole nation to obtain the benefit of judicial capacity, whenever and wherever it may be found, whether or not it is in a man who is sufficiently well-known, popular, or 'available' to be nominated or elected to anything.

"Mr. Justice Holmes was appointed to the Supreme Judicial Court of Masachusetts in 1882 because he was an outstanding legal scholar. After some years of practice in Boston, he had recently joined the faculty of the Harvard Law School and intended to devote himself to teaching law. He was a man whose training and tastes were such that, like many other distinguished Massachusetts judges, the idea of entering a political contest for a seat upon the bench would not have been considered for a moment. An elective system would have excluded him from the bench and have prevented the public from receiving the benefit of his service. Fortunately, Massachusetts has always stood by the great principle of the twenty-ninth article of her bill of rights and consequently has been able to contribute Judge Holmes to the nation.

"Few of us realize that this man, who is still in active service at eighty-eight, was seriously wounded four or five times during the Civil War, returning to service again each time as soon as he was able to get about. A short time ago, a letter from his father, Dr. Oliver Wendell Holmes, was discovered which was printed in the *Harvard*

Alumni Bulletin for December 22, 1927, and from which the following extracts are taken. This letter was written to Mr. Frederick S. Cozzens of New York, by Judge Holmes' father, Dr. Oliver Wendell Holmes. It was dated, 'May 24, 1863,' and was written after the publication in the *Atlantic Monthly* of Dr. Holmes' account, 'My Hunt After the Captain,' and soon after the young soldier had been wounded at Fredericksburg.

"'My dear Cozzens:

"'I thank you, too, for your pleasant words about my boy, 'The Captain,' of my *Atlantic* narrative. He has had singular escapes to be sure. Five times hit. 1. Knocked down at Ball's Bluff by spent ball in the stomach. 2. Shot through heart, *in* directly over heart, *out* over right nipple. 3d. At Antietam through neck, within an inch or so of middle line; 4th at Fredericksburg, the other day, his knapsack supporter knocked to pieces, as he lay in front of a battery. 5th at next discharge but one, a bullet from a spherical case buried in his heel bone, from the outer side. This last wound will keep him quiet for a while, but probably not leave any permanent lameness. He lies on a couch and receives lots of pretty company, is very jolly and does not seem to think much about his past exposures. Wounds of the bone are slow affairs and the war may have changed its aspect before he is on his foot again. I don't think he values himself so much for his military adventures, though he has really been brave and faithful, as (illegible) powers and tastes which he is having a chance to cultivate just now. Perhaps you would like a photograph of the 'Boy' (At 22 standing six feet and over in his military shoes) at any rate I will send you one.

"'Very sincerely yours,

"'OWH.'"

EAST MEETS WEST IN SPITE OF KIPLING

WHEN Rudyard Kipling said that "East is East, and West is West, and never the twain shall meet," he proved conclusively that he was no lawyer. For as a lawyer he would have had occasion, now and again, to peruse the reports of the Judicial Committee of the Privy Council, and even a cursory glance at them would have shown that before the Privy Council, at least, east and west met frequently.

As an illustration of a little East-West rendezvous, take a case from Singapore in which the Privy Council was called upon to settle a dispute over a deed or gift. It came up from a decision of the Supreme Court of the Straits Settlements: *Inche Noriah binte Mohamed Tahir v. Shaik Allie bin Omar bin Abdullah Bahashuan*, 140 Law Times Reports, 121. (Names possibly abbreviated for lack of space.)

The appellant—let us call her Mrs. Tahir—was a Malay woman, of great age, and wholly illiterate. She owned certain leasehold properties in the city of Singapore. The respondent, who gloried in the aforementioned name of Shaik Allie bin Omar bin Abdullah Bahashuan, was an Arab, and the appellant's nephew, though how a Malay woman acquired an Arab nephew is not explained. Shaik Allie bin Omar (in part) came to Singapore when he was twenty-three years old, wholly penniless. His good Aunt Inche started him in business, and he soon married. In a few years he had prospered so well that he divorced his wife and married a better one. After a while, when the old woman became too infirm to move about, nephew Allie took over the management of her property, and collected the rents for her. Aunty Inche was too weak to leave the house, and seldom saw any friends or relatives except her Arabian relative, who lived in a house connecting with hers, and who visited her daily. Evidently as a result of these daily visits, Aunty Inche, who, by this time was no longer quite bright, suddenly deeded almost all her property to her helpful nephew, leaving herself with a gross income of about $30 a year.

This deed of gift she later sued to have set aside, upon the presumption of undue Arabian influence. Old Inche Noriah binte Mohamed took the stand in her own behalf, but her testimony was disregarded by mutual consent, her mind being at that time so feeble as to render her evidence quite valueless. It was proved, however, that she had had counsel, but it seems counsel did not know she was parting with practically all of her property and, as the Judicial Committee put it, "he certainly does not seem to have brought home to her mind the consequences to herself of what she was doing, or the fact that she could more prudently, and equally effectively, have benefited the donee without undue risk to herself by retaining the property in her own possession during her life and bestowing it upon him by her will."

The trial court gave judgment in her favor, setting aside the deed of gift. This was reversed on appeal to the local Supreme Court, whereupon the appellant appealed to His Majesty in Council. The Privy Council, after due consideration, restored the judgment of the trial judge, setting aside the deed, and charged Shaik Allie bin Omar with all the costs of the trial and the two appeals.

There is, of course, no reason whatever for relating all these details of the case here, except that they should serve as a solemn warning to any illiterate old Malay woman who may happen to read this. Although Aunty Inche finally recovered her property, the next one may not be so fortunate.

Another little encounter, perhaps even more interesting, was between Africa and Europe, in the British Protectorate of Sierra Leone. The case involved questions of professional ethics and is

known officially as *W. E. A. Macauley vs. Judges of the Supreme Court of Sierra Leone and others,* 139 Law Times Reports, 314.

It seems that a trader named Macarthy operated a general store in one of the native villages of Sierra Leone, which lies along the west coast of Africa, just north of Liberia. But he refused to comply with one of the quaint old customs of the place—the payment of the settler's fees. Thereupon the paramount chief of the village, named Pa Kaini, picketed his store, and forbade his people to trade there. Macarthy countered by instituting suit against Pa Kaini for £4,000 for damages suffered in unlawful interference with his business.

Pa Kaini as a respectable African village chief no doubt had a good magician in his retinue, but he evidently felt he couldn't trust him to ward off the mysterious menace of a lawsuit. Self-help no doubt suggested itself to him, being an honorable tradition in those parts, but the British authorities were known to be averse to this kind of summary procedure. So Pa Kaini did the inevitable thing. He got a lawyer, a Mr. Wright, a leading barrister and solicitor of the colony, residing at Free Town. Mr. Wright agreed to accept a fee of 30 guineas and to place his legal magic at the disposition of Pa Kaini, and all seemed to be going well.

Unfortunately Mr. Wright was a member of the Legislative Council of the Colony, and found that his engagements with it would not permit him to attend the trial in the Circuit Court at Moyamba on the day set. So he asked the appellant, whom he knew as the son of his chief clerk, to hold the brief for him at the trial and agreed to pay him 20 guineas for doing so. What followed, from the professional ethics standpoint, is set forth in the charges filed with the Chief Justice of the Supreme Court at the instance of the Attorney General of the Colony, in connection with a motion calling on Mr. Macauley to show why his name should not be struck off the Roll of the Court:

"(*a*) That after having accepted and agreed to hold a brief on behalf of the Hon. Claude Emile Wright, barrister-at-law, to represent the defendant in the case of *Macarthy* v. *Pa Kaini* then pending in the Circuit Court at a fee of 20 guineas, the appellant did on or about the 10th June 1926, without any just reason and cause receive and obtain from the said Pa Kaini a certain large sum of money to wit, the sum of 135*l.* for or in respect of his appearance on behalf of the Hon. Claude Emile Wright in the said proceedings, contrary to good conscience and honest dealing and without the authority of the said the Hon. Claude Emile Wright.

"(*b*) That being briefed as aforesaid to defend Pa Kaini in the Circuit Court, the appellant did on or about the 1st July 1926, demand from the said Pa Kaini a further sum of 200*l.* for his services in connection with the appeal to the full court then pending and did by the said demand induce the said Pa Kaini to deliver to him an additional sum of 50*l.* without the knowledge and authority of the said the Hon. Claude Emile Wright and without being authorized by the said the Hon. Claude Emile Wright to appear on his behalf in any appeal from the judgment of the Circuit Court."

The attorney argued before the Chief Justice that the case had been transferred completely to him and that Pa Kaini was thenceforth and therefore his client, with all the rights, titles and appurtenances thereof; also that the case had been difficult and involved a large sum; and that the fee of 30 guineas was insufficient; also that Pa Kaini had voluntarily offered him the large fee of £250. All of which the Chief Justice rejected, and entered an order striking him from the roll of attorneys of the Protectorate.

Appeal to the Judicial Committee of the Privy Council brought no solace. That body, per Lord Warrington, concurred in the conclusion reached by the Sierra Leone Chief Justice and humbly advised His Majesty that the appeal ought to be dismissed. It even quoted with approval expression of the Chief Justice that "It is a startling proposition and one which I cannot for a moment assent to, that people holding the peculiar views which Mr. Macauley apparently does hold with regard to the relation or otherwise of solicitor and client should be allowed to run loose especially in such 'an Alsatia' as the Sierra Leone Protectorate without being answerable to any authority for their professional conduct." And it added this comment of policy on its own account:

"Their Lordships appreciate the necessity in a country so described of inducing the inhabitants to resort to the courts for the settlement of their disputes rather than to the possibly more familiar means of personal violence. For this purpose it is essential that the people should be brought to feel the greatest respect not only for the impartiality and independence of the tribunals, but for the honesty and fairness of those who practise before them. To use the Chief Justice's words, the circumstances disclose 'a disgraceful combination of rapacity and dishonesty,' and their Lordships feel that if they were to recommend a mitigation of the sentence in this case, they would be dealing a serious blow at the authority of the judge entrusted by law with the discipline of the Profession in the colony."

So professional ethics were vindicated, but what of Pa Kaini? He won in the lower court, but the intruder Macarthy appealed, and the appeal is pending. Fortunately he is back in the hands of his original counsel. He is apparently still out all the extra pounds he paid to his exploiter, but he is compensated somewhat by the latter's disbarment—if he knows what that means.

The moral is of course plain to everybody: Why read Joseph Conrad and Rudyard Kipling when the reports of the decisions of the Judicial Committee of the Privy Council are available?

The Restatement and Local Variations

"No restatement of the law in forty-eight jurisdictions could fail to disagree with the local courts of various jurisdictions in at least some particulars. This variation might be caused either by local statutes changing the common law, or by the fact that courts in different jurisdictions had reached different results on the same problem.

"A very important question then arises, as to what extent does the local law of any jurisdiction differ from the restatement? Another question arises: assuming that the local court of last resort desires to follow the restatement, as it undoubtedly would be inclined to do, can it do so, either on account of its own previous adverse decisions or on account of the statutes?

'It is believed that the differences between the local law and the restatement may be easily magnified. Undoubtedly differences exist, but the number of them is likely to prove comparatively small. It becomes exceedingly desirable to know what differences do necessarily exist.

"It would seem to be one of the functions of the modern law school to assist in the investigation of such a problem as this. Such an effort requires first of all a fairly considerable library, but most of all, it requires an interest in the problems of the law and a devoted spirit. The College of Law hopes to be able to cooperate in any way it may be called upon to do by the State Bar Association in creating an interest in the restatement of the law, an understanding of its purposes, and in working out the details of the local law to the extent that they may differ from the restatement."—*Kentucky Law Journal.*

AMERICAN BAR ASSOCIATION JOVRNAL

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NEW METHODS OF APPROACH

Nothing better illustrates the new methods of approach to the solution of problems in the administration of Justice than the reports of State Judicial Councils which appear in this and previous issues of the JOURNAL.

There is a marked absence of reasoning from a priori principles and an equally marked desire to get the facts as a basis for further inference. We might say that the profession has acquired a fruitful scientific humility. The Councils are content to find out by earnest inquiry just what has been going on in the courts of all kinds under present conditions before proceeding to decide just what changes should be attempted in those conditions. As a result of this course, their recommendations have a degree of convincingness they would never have attained in other days, when they would have been regarded more or less as reactions of the personal characters and philosophies of those who made them. Sometimes these recommendations of today seem not only convincing but almost inevitable.

All this is, of course, a manifestation in the field of action of a spirit which had already made itself familiar in the realm of legal scholarship. The realization that law is a science, and not a mere scholastic exercise, is what gives life and purpose to such an enterprise as the Institute for the Study of Law at Johns Hopkins University and to undertakings at Yale and other institutions of learning. No matter what their specifically declared ends may be, the common factor is this new method of approach. The consequences both in the field of scholarship and in that of actual administration should be important.

CONCERNING THE JOURNAL

Members of the Association may be interested in certain plans for making the JOURNAL more attractive to its readers. In the first place, the size of the average issue has been increased from seventy-two to eighty pages, thus giving an opportunity to print more material. This additional space is, in the main, to be devoted to the Department of Current Events, the Department of Letters of Interest to the Profession, to News of State and Local Bar Associations, and to publication of more illustrations than heretofore.

The character of the JOURNAL will, of course, remain the same and the effort will be continued to give its readers a selection of articles that will keep them informed of the principal movements in the field of scholarship, judicial administration and legal organization. But it is believed that improvements which the membership will generally approve may be made in the directions just indicated.

Brief letters on matters of immediate legal interest—or longer ones if the subject justifies—will be welcomed from our readers. Heretofore lack of space has caused us to limit rather strictly the number of such communications published, but with the increased size of the JOURNAL this difficulty will be, in part at least, removed. The assistance of Secretaries of the State Bar Associations is particularly asked in making the department devoted to their activities a clearing house for information as to what is being done all over the country to improve the administration of justice. There is also need for a report of the significant events in the activities of the local Bar Associations and of the various Associations of Judges and Prosecuting Attorneys in the various states.

The increase in the space devoted to the Department of Current Events to about seven pages will permit the publication of more news of special interest to the Bar. There will be no attempt to duplicate legal news items carried by Press Associations and hence presumably well known to our readers. But there is a large amount of

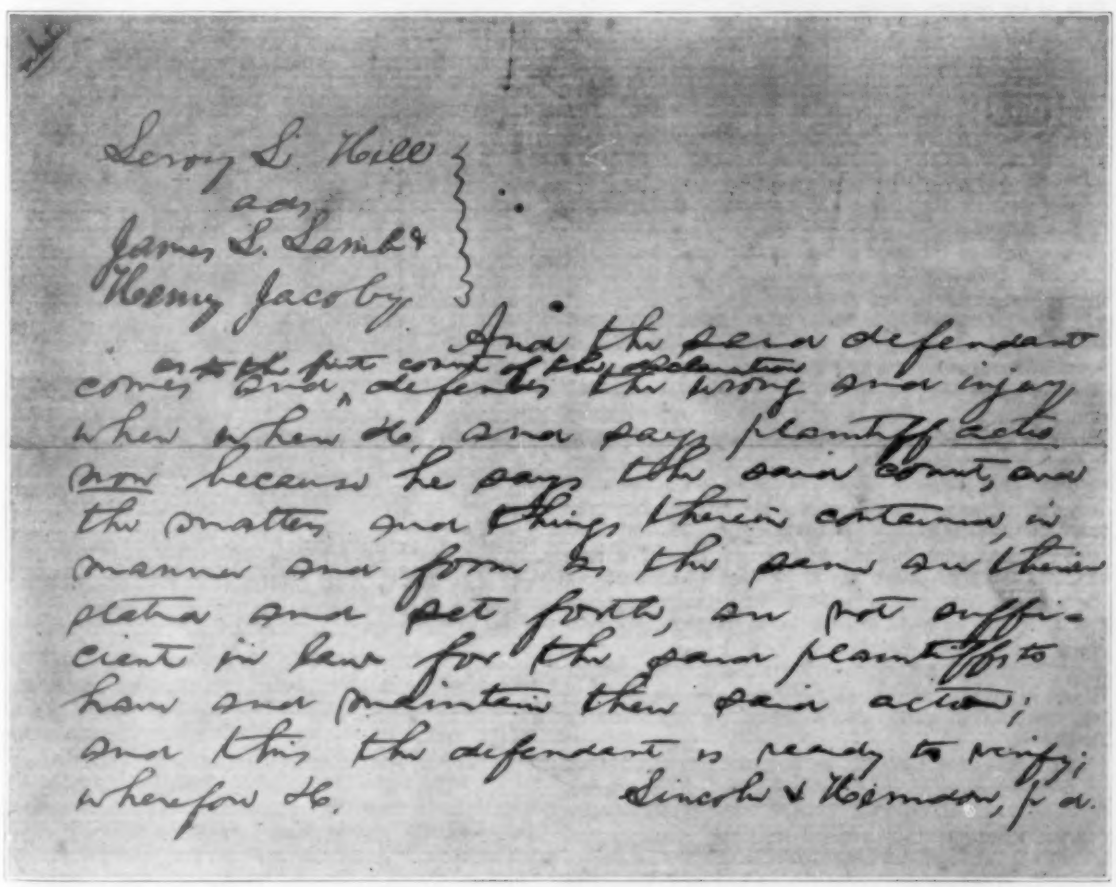
legal news of special character which does not achieve this circulation and this will be drawn on as far as possible to make the Department more attractive.

INSTITUTE SENDS OUT QUESTIONNAIRE

We take pleasure in publishing the following notice at the request of the Institute:

"The Institute for the Study of Law at the Johns Hopkins University is preparing with a view to publishing, a survey of all studies and research in or related to law now in progress or completed in 1928. The term 'research in law' is to be interpreted in its broadest sense, so as to include all studies, writings, or investigations large or small. The object of this survey is to present a picture of the work of all groups whose studies are concerned directly or indirectly with any phase of law or involve the use of legal materials. It is believed that such a record of studies will serve to make them available to a greater number, and will help prevent duplication and overlapping of work in the future.

"A questionnaire has been sent to faculties of the law schools, to faculties in economics, political science, sociology and psychology of the universities in the Association of American Universities, as well as to organized research bureaus, foundations and commissions. Those who have not received this questionnaire and are doing work which they believe should be included in this survey are requested to write to the Institute for the Study of Law of their work, and to suggest names of others whose work they believe should be included. As the report is to be completed in June an early reply is needed. Address: The Institute for the Study of Law, The Johns Hopkins University, Baltimore, Md."


Leroy L. Hill
and
James L. Lamb &
Henry Jacoby

and the said defendant comes and defends the wrong and injury when & where &c. and says plaintiff ought not because he says the said Court, and the matters and things therein contained in manner and form as the said declaration and set forth, are not sufficient in law for the said plaintiff to have and maintain their said action; and this the defendant is ready to verify; wherefore &c.

Lincoln & Herndon, p. d.

The above photograph of a demurrer in Lincoln's own handwriting is taken from the original in the possession of Hon. J. Weston Allen, of Boston, Massachusetts. It was one of the interesting documents to be seen in the Exhibition of Documents and Manuscripts at the Semi-Centennial Meeting at Seattle. A search at Springfield shows that the case did not reach the Supreme Court of Illinois, but Lincoln and L. T. Logan represented Leroy L. Hill in Trailor v. Hill, 7 Ill., page 364.

REVIEW OF RECENT SUPREME COURT DECISIONS

Right of State to Forbid Public Service Corporation to Withdraw Service in Part of State —Determination of Nonmineral Character of Lands Granted to State—Effect of Temporary Injunction on Question of Contempt for Disobeying State Commission's Order—Carrier's Liability for Agent's Fraud—National Bankruptcy Act and State Insolvency Statute—When Corpus of Trust Created Before Imposition of Estate Tax Must Be Included in Gross Estate for Determination of Net Estate Taxable

By Edgar Bronson Tolman*

Public Lands — Determination of Non-Mineral Character

Under a statute which grants to a state certain sections of land, if not mineral in character, and which does not require an administrative officer in the Land Department to issue a patent therefor on application of the grantee, such officer has no power to determine generally the validity of the title of a subsequent claimant thereto, without determining as a fact the non-mineral character at the time of the original survey.

West v. Standard Oil Co., Adv. Op. 149; Sup. Ct. Rep. Vol. 49, p. 138.

This suit was brought by the Standard Oil Company to enjoin the Secretary of the Interior from continuing proceedings in the local land office in California to determine whether certain lands were non-mineral when the survey of them was accepted. The lands involved were in Elk Hills, California, in a section which, if not mineral or otherwise disposed of, was granted by Congress to the state in aid of public schools. The company here claimed its title under patents issued by the state in 1910 and mesne conveyances.

The proceedings sought to be enjoined were based on a charge that the lands were known to be mineral in character in 1903 when the survey was approved. If so, the title did not pass, because Congress excluded mineral land.

The statute did not make provision for determining what land was excluded. The issue of no patents or equivalent evidence of title in the state was provided for, and no patent or other evidence of title has been issued by the Secretary of the Interior. The oil company here contended that before the institution of proceedings here involved the non-mineral character of the land had been finally established by the Department, and that it hereby lost jurisdiction so that this proceeding should be stopped.

Certiorari was granted to review a decree allowing an injunction as prayed, and thereupon the decision was reversed in an opinion delivered by Mr. Justice Brandeis.

In reviewing the facts he first outlined the history of events leading up to the alleged final determination by Secretary Fall on June 9, 1921. The land had been originally returned as mineral in 1903. But various conflicting rulings relating to it were made subsequently. The decisive question in the case here was whether the said order of Secretary Fall involved a determination of the fact of the known mineral character of the land at the time of the approval of the survey of January, 1903.

The trial court had found among its findings that Secretary Fall had "dismissed the proceedings after a consideration of the law and the facts"; "that the order of dismissal . . . was a judicial determination of the known mineral character of the land on January 26, 1903"; and that its correctness could not be questioned "by collateral proceedings, except for fraud."

Before considering the evidence in support of these findings, the learned Justice reviewed cases bearing on the effect of administrative determinations saying:

> Ordinarily, where an act granting public lands excludes those known to be mineral, the determination of the fact whether a particular tract is of that character rests with the Secretary of the Interior. . . . If such act provides for the issue of a patent, whether it be to pass the title or to furnish evidence that it has passed, the patent imports that final determination of the non-mineral character of the land has been made. The issue of the patent terminates the jurisdiction of the Department over the land. . . . And in the courts the patent is accepted, upon a collateral attack, as affording conclusive evidence of the non-mineral character. . . . Similarly, if the granting act provides for other action by the Secretary equivalent to a patent, such as approval of a list of the lands, the approval ends the jurisdiction of the Department, *Cole v. Washington*, . . . and it, likewise, imports that the necessary determination has been made. . . . Even where the granting act does not require either the issue of a patent to the grantee or such equivalent action, the Secretary may have occasion to make a determination of the known mineral character of the land, as when rights adverse to the grantee are asserted under the mineral, leasing or other laws. . . . In such event, the issue of the patent, or other instrument evidencing title, likewise imports that the determination has been made. . . . For, in every such case, the determination of the mineral character is a prerequisite to the authority exercised in the performance of a duty imposed.

An examination of the evidence then disclosed that a determination of the fact of the known character of the land in 1903 had not been made by Secretary Fall, but that he had dismissed the proceeding on the supposition that a rule of law made that fact of no legal significance. Although the order of dismissal itself embodied no statement as to the reason for dismissal, the stipulated facts contained the following:

> "It was the contention of the transferees from the State, with which contention Assistant Secretary Finney disagreed at the hearing that it could serve no purpose to take evidence in the local land office to determine the question whether or not said section or the lands adjacent

*Assisted by Mr. James L. Homire.

thereto showed structural and geological conditions indicative in 1903 of the existence of oil on said section under conditions justifying developments therefor for the reason that said questions presented an immaterial question of fact and said question was not argued or discussed at the proceedings held on June 8, 1921, or at any conferences prior thereto between the representatives of the transferees and the Secretary of the Interior or the First Assistant Secretary of the Interior, except as shown in the brief and in the transcript of proceedings."

In view of this conclusion it became necessary to consider the power of the Secretary under the law to determine generally the validity of the company's title without ruling on the contested issue of fact. Consideration of this proposition led to a conclusion adverse to the company here, for reasons stated as follows:

> Where by the terms of an act the Secretary is required, upon application of the claimant to issue a patent, as in *Michigan Land & Lumber Co. v. Rust*, . . . or to certify a list, as in *Frasher v. O'Connor*, . . . or to approve a location for a right of way, as in *Noble v. Union River Logging* Railroad, . . . or to make a survey and approve a selection, as in *Shaw v. Kellogg*, . . . Congress, by implication, confers upon the Secretary the power to make all determinations of law as well as of fact which are essential to the performance of the duty specifically imposed. After issue of the patent or other like instrument, his findings of facts are conclusive, in the absence of fraud or mistake, not only upon the Department, but upon the courts, . . . and though his rulings on matters of law are reviewable in the courts, . . . they are not subject to re-examination by the Department. . . . For in making such determinations he acts as a special tribunal with judicial functions. . . .
>
> But here no similar affirmative duty rested upon the Secretary to the performance of which the determination of the question of law was incidental. Secretary Fall owed no active duty to the State or to any other claimant. His duty in respect to the land was solely that owed to the United States—the duty to preserve its interests therein. The inquiry directed to be made in the local land office had been ordered by a predecessor solely in the performance of that duty. If as a result of the inquiry it should be found that the land was known to be mineral, the Government would, if necessary, bring legal proceedings for possession and for damages or an accounting. If it should be found that the land was not known to be mineral, there would be no occasion for any further departmental action. . . . We think that Congress did not confer upon the Secretary of the Interior the power to pass generally upon the right of the State to the land. When the Secretary has the duty to issue a patent or to furnish other evidence of title of a claimant, he must have authority to determine the questions of law incident to the performance of that duty. . . . But here no such duty rested upon him. . . .
>
> To read into the legislation, under such circumstances, authority to pass upon the State's claim of right to the land, regardless of its known mineral character, would create, by implication, a power in direct contravention of the expressed intention of Congress that mineral lands were not granted to the State. Thus, the Secretary would be constituted an agent rather for relinquishing than for preserving the rights of the United States in the public lands. . . .
>
> When Secretary Fall undertook to determine, not as a fact whether the land was known to be mineral in 1903, but as a proposition of law, that, because of other conceded facts, the Company's title had become unassailable, he acted without authority; and the order of dismissal based thereon did not remove the land from the jurisdiction of the Department.

Mr. W. C. Morrow argued the case for the petitioner and Messrs. Oscar Sutro and Louis Titus for the respondent.

Public Utilities—Rate Regulation

The federal Constitution does not prohibit a state from forbidding a public service corporation to withdraw its service in part of the state where it continues to do business in other parts.

The burden of proving a rate confiscatory rests on a public service corporation, and a rate based upon the book value of its properties placed thereon by such corporation will not be increased in the absence of clear and convincing proof of a higher value. Such corporation may not make its rate confiscatory by reducing its earnings by a contract unduly favorable to a subsidiary; and where the facts justify it 50% of the earnings of such subsidiary may be included in determining the income of the parent company from properties constituting the rate base.

Such corporation may not invoke the action of a state authority and subsequently, when dissatisfied with the action taken, assail the state or federal constitutional powers of such authorities.

United Fuel Gas Co. v. Railroad Commission, Adv. Op. 104; Sup. Ct. Rep. vol. 49, p. 150.

The United Fuel Gas Company, a West Virginia corporation, and the Warfield Natural Gas Company, a Kentucky corporation, appealed to the Supreme Court on direct appeal from a final decree of a federal district court sitting in Kentucky. The latter had denied an injunction restraining the Railroad Commission of Kentucky, appellee, from establishing a confiscatory rate for the sale of natural gas in certain cities in Kentucky or in the alternative from preventing the companies from discontinuing service in such cities.

The West Virginia corporation has gas fields principally in West Virginia and sells gas in that state and also in Ohio and Kentucky. The business in West Virginia included wholesale business not subject to regulation at the present time. Franchises in Kentucky expired in 1918, but the corporation continued to render service in the Kentucky cities until 1923. At that time it organized the appellant Kentucky corporation, whose stock it owns; conveyed to the latter its rights; and purported to withdraw from business in Kentucky. This subsidiary distributed gas there after its organization.

Prior to the organization of the subsidiary corporation the Kentucky Commission had ordered a reduction of rates to 80 per cent of the former rate of 40 cents per 1,000 cubic feet, less 5 cents for prompt payment. When it had been organized the subsidiary filed a schedule with a rate of 45 cents per 1,000 cubic feet, less 5 cents for prompt payment in the cities in question. It asked the commission to fix this as a fair rate or else to permit it to withdraw from the cities involved. After a hearing the commission denied the application and construed its prior order as fixing a 28 cent rate, i. e., 80% of 35 cents.

Relief was then sought in the federal court. It construed the order as fixing a 32 cent rate. This it upheld and enjoined the commission from fixing any lower rate.

The companies appealed, basing their appeal on the following contentions: (1) the rate fixed violates the Fourteenth Amendment, because it is confiscatory and because the findings of the commission did not support the order which is not subject to judicial review under the state statutes; (2) the order is invalid because it requires the companies to continue service in violation of the state constitution; (3) the order is invalid because the commission was not constitutionally created, for the reason that the act creating it violates a provision of the state constitution providing that no

legislative act shall relate to more than one subject, to be expressed in its title; (4) the statute subjecting the corporations to the commission's jurisdiction after the expiration of its franchise and requiring continuance of service, unless the commission permits withdrawal, operates as a renewal of the franchise, and is not in conformity with the provision of the state constitution limiting franchises to twenty years.

The latter two contentions were rejected in an opinion delivered by MR. JUSTICE STONE, upon an analogy to the rule that "one who has invoked action by state courts or authorities under state statutes may not later, when dissatisfied with the result, assail their action on the theory that the statutes under which the action was taken offend against the Constitution of the United States":

> Upon like principle we think that appellants who have procured action by a state commission under a state statute may not assail that action in a federal court of equity on the ground that that statute, or the one creating the commission, is void under the state constitution.

No persuasive force was found in the objection to compelling the utilities to continue service, assuming the state law granted to the commission the power to compel continuance. The effect of the federal Constitution on this point was stated as follows:

> The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders. This duty does not permit it to pick and choose and to serve only those portions of the territory which it finds most profitable, leaving the remainder to get along without the service which it alone is in a position to give. An important purpose of state supervision is to prevent such discriminations, . . . and if a public service company may not refuse to serve a territory where the return is reasonable, or even in some circumstances where the return is inadequate but that on its total related business is sufficient, . . . it goes without saying that it may not use its privileged position, in conjunction with the demand which it has created, as a weapon to control rates by threatening to discontinue that part of its service if it does not receive the rate demanded. The powers of the state, so far as the federal Constitution is concerned, were not exceeded by the action of the commission, in compelling appellants to continue their service in the cities named so long as they continued to do business in other parts of the state, and to there avail of the extraordinary privileges extended to public utilities.

Questions relating to the legality of the creation of the commission were briefly disposed of with the observation that, in the absence of a showing of irreparable injury they constituted, in themselves, no ground for relief. Finally, the confiscatory nature of the rate fixed was more fully discussed as constituting the decisive issue in the case.

In arriving at their valuation figure the corporations allocated a certain portion of their total properties both within and outside of Kentucky as subject to regulation by Kentucky. The total properties were valued by the commission at a figure approximately $37,000,000 lower than the valuation figure assigned by the companies. This was reflected in the properties on which the rate was based, so that the earnings received on the rate fixed were more than $100,000 less than the earnings to be received on the rate contended for.

In determining the valuation of their properties the utilities made certain assumptions. With reference to those assumptions the learned Justice said:

> In the view which we take, and for present purposes only, we likewise make those assumptions without determining their validity. They are (a) that in the case as presented present reproduction value of property used and useful in the business, if ascertainable, is to be taken as the rate base; (b) that under the circumstances of this case it is not enough that the return on appellants' business as a whole is remunerative but earnings of the property used in or properly allocated to the Kentucky regulated business must be separately considered in ascertaining whether the rate is confiscatory; (c) that both proven and probable areas of appellants' gas acreage, whether shown to be presently productive or not, if acquired in a prudent administration of appellants' business, are to be included in the valuation for rate making purposes; (d) that depreciation and amortization are to be calculated on the basis of the present value of the property rather than upon the original cost or investment; (e) that, although entitled to earn a fair return on the preesnt value of their gas leases, the "delay rentals" paid upon them pending drilling and development are properly chargeable to operating expense.

The disparity between the two valuation figures above described was due largely to a difference of opinion as to the value of certain gas rights which the corporations had in various lands. In a minor degree the profits from gasoline proper to be included in the net earnings of the business also affected the question of fair return.

After a brief description of the properties the theories of valuation urged by the corporations were commented on as follows:

> Appellants do not accept either cost or market value as the basis of value of their gas rights. Instead they urge that their assembled holdings of gas rights are unique in that they cannot be reproduced and that their value depends largely upon their peculiar nature and situation. They rest their claim to a largely enhanced value over book value upon alternative theories supported by two classes of expert testimony.

The first theory involved a determination of the volume of gas in the territory, but the methods used in this determination were characterized in the evidence as "difficult and uncertain" as to a large portion of the territory. In connection with this calculation testimony was adduced respecting an unregulated gas market in Pittsburgh, where the gas of the corporations here could compete at a price which would give the properties in question a valuation of $32,458,129, or but slightly less than the valuation fixed by the appellants.

The second theory involved a valuation based upon what a willing buyer would pay to a willing seller. Experts testified as to this. But their testimony and that of witnesses testifying as to the valuation based on the Pittsbugh market were found to be subject to objection.

> Examination of their testimony discloses that these estimates were not based on prevailing prices for gas leases or on actual sales but, as in the case of the geological and engineering experts, upon an estimated or assumed exhaustible supply of gas available to appellants until exhausted, and upon a predictable price for natural gas in unregulated markets through a future period of about eighteen years. Common characteristics of both methods of valuation, therefore, are the estimation on uncertain bases of the volume of gas available and of the price at which it may be sold through a long future period.
>
> In both methods of valuation, the value of property used in a business whose rates are regulated is made to depend on an assumed earning capacity and the data relied on to establish assumed earning capacity are themselves essentially speculative—so much so as to form no trustworthy basis for the computation of value.

The speculative nature of much of the evidence and the uncertainty of certain assumptions involved were emphasized.

> It is true that a part of appellants' business is not regulated at present, but it does not appear that the ultimate distribution of their product to consumers in other

states will be immune from regulation either because of the interstate commerce clause, . . . or for other reasons, and there can be no reasonable assumption that it will be. The unique character of appellants' control over a natural product limited in amount, asserted here as a basis of value, the obvious necessity of securing franchises or special privileges to enable them to distribute their product to consumers under the conditions assumed, and other circumstances which subject them to regulation in Kentucky and West Virginia, make inadmissible the assumption that the price to consumers would remain unregulated elsewhere.

And in other respects the assumed earning capacity is so wanting in probative force as to require its rejection in the circumstances here disclosed. It rests on a prediction, feebly made, that the estimated amount of gas will be available as required through a period of eighteen years; that natural gas so transported and used as a fuel will command a price of from 30 to 35 cents per 1,000 cubic feet through that period in a market yet to be established despite the changes wrought by invention and improved business and manufacturing methods; and a further prediction not only of what plant and equipment must be constructed and maintained to effect delivery of the gas for this period to consumers in the city of Pittsburgh but also of the cost through a like period, of the construction, maintenance and operation of that plant and equipment. Such predictions can only be made on the basis of data which are not and cannot be known, and most of which are in the highest degree speculative. Such a process of estimating value is without any known sanction.

On the record as made, appellants have failed to present any convincing evidence of value of their gas field which would enable us to assign to it any greater value than that which they appear to have assigned to it on their books. This book value, therefore, may be accepted, not as evidence of the real value of the gas field, but as an assumed value named by the appellants, which, on the evidence presented cannot reasonably be fixed at any higher figure.

The contention respecting the propriety of including in the earnings the revenue from gasoline was likewise rejected. In disposing of this the process of extracting gasoline and the relationship of the appellants to the extracting company were briefly described. From this it appeared that the process required joint use of considerable facilities by both the extracting company and the gas company, requiring a prorating of expenses. Here the extraction company had been organized by the gas company, and all its stock transferred to the latter's stockholders. The subsidiary pays to the parent company ⅛ of its gross profit from the gasoline extracted. The evidence showed that the gas companies had borne a share of the expense on jointly used property in excess of the return received from gasoline extraction; that parties dealing at arms length in other cases had agreed on a 50% division of profits. It appeared further that allowing the gas company 50% of the net earnings, nevertheless during the years from 1917 to 1922 the extracting company would have earned 102% of its capital investment each year, and 80.40% in 1923. Under these circumstances no adequate reason was found for not including 50% of the net proceeds from extraction of gasoline in the earnings of the companies here regulated.

MR. JUSTICE MCREYNOLDS concurred in the result.

The case was argued by Mr. John W. Davis for the appellants and by Mr. John T. Diederich for the appellees.

Corporation Commissions—Order—Effect of Temporary Injunction

Acts done in disregard of an order of a state commission, but under protection of a temporary injunction suspending such order, do not constitute contempt of the commission and it may not refuse to hear further applications until restoration of the status quo the order was entered.

Lawrence v. St. Louis-San Francisco Ry. Co., Adv. Op. 159; Sup. Ct. Rep. Vol. 49, p. 106.

The railway company here had obtained an interlocutory injunction restraining the defendants from interfering with the removal of the railway's shops from Sapulpa to West Tulsa, Oklahoma. On the hearing the district court offered the appellants the opportunity to suspend the interlocutory decree by giving a supersedeas bond, but they declined, and the decree was entered on the railway's filing a bond for $50,000.

Thereafter the Supreme Court reversed the decree, holding that the interlocutory injunction had been improvidently granted. Meanwhile the railway company had proceeded with the removal. Immediately upon the reversal the appellants applied to the district court to compel restoration of the *status quo*. The court refused to do this, but directed the railway, as a preliminary step in the cause, to apply to the corporation commission of Oklahoma to dissolve the commission's restraining order which the interlocutory decree had suspended.

The railway applied to the commission, but the commission, on objection of the appellants refused to consider the application until the *status quo* had been restored by the railway. Its ruling proceeded upon the theory that the acts of the railway in proceeding in violation of the commission's order under protection of the interlocutory injunction was contempt of the commission and that the commission could properly demand that the contempt be purged before hearing the matter further.

Thereupon the railway filed a supplemental bill setting forth these further facts and the commission's refusal to hear its application until the *status quo* had been restored. The court then granted a permanent injunction, and the appellants took a direct appeal to the Supreme Court. There the decree was affirmed in an opinion delivered by MR. JUSTICE BRANDEIS. He first stated the appellant's contention that the commission's refusal to hear the application until the railway had purged itself of contempt of the commission by restoring the *status quo* did not relieve the railway from the necessity of obtaining the commission's consent to remove the shops, and then said:

> The contention is unsound. The purpose of the restraining order, issued upon the filing of the bill, had been to maintain the *status quo*. It, therefore, contained a clause ordering "that the plaintiff in this case take no action toward removing its shops, division point, or changing the runs of its trains, until further order of this Court." This clause was omitted from the interlocutory decree. The purpose of the injunction thereby granted was not, as in *Vansandt v. Argentine Mining Co.* . . . to maintain the *status quo*, but to prevent interference with the desired change. "The interlocutory decree," as we have said, "set the Railway free to remove the shops before the case could be heard on final hearing," . . . The District Court had, when it issued the injunction, jurisdiction of the parties and of the subject matter; and it has never relinquished its jurisdiction. It is true that this Court has held that the interlocutory decree was improvidently granted. But it did not declare that the decree was void. . . . The interlocutory injunction, until dissolved by our decision, was in full force and effect. The appellants refused to assume the risk attendant upon suspending the decree by means of a supersedeas bond. The appeal did not operate as a supersedeas. . . .
>
> Thus, the interlocutory decree relieved the Railway from any duty to obey the restraining order of the Commission. Because such was its effect, the lower court required the Railway to furnish the $50,000 bond. By

availing itself of the liberty given to remove the shops and division point, the Railway assumed the risk of being required to restore them if it should be held that the interlocutory injunction was improvidently granted '. . . and also the risk of having to compensate the appellants, to the extent of $50,000, for any damages suffered by reason of the removal. But it was clear that, upon final hearing, the Railway might prove that it was entitled to a permanent injunction; and the District Court was not obliged to order restitution meanwhile. If it had not, when entering the interlocutory decree, required that bond be given, no damages could have been recovered on the dissolution of the injunction. . . . Although it required the bond, and this Court held that the interlocutory injunction had been improvidently issued, the District Court could, in its discretion, refuse to assess the damages until it should, after the final hearing, have determined whether the plaintiff was entitled to a permanent injunction. . . . It might then refuse to allow recovery of any damages, even if the permanent injunction should be denied.

The opinion then stated the advantages resulting from the change of shops as disclosed by the affidavits. and the hardship entailed in a restoration of conditions and observed that these facts constituted a reasonable basis for the failure of the district court to require restitution.

The opinion was concluded as follows:

We have no occasion to pass upon the constitutionality of the state statute. The facts just stated were later set forth in the supplemental bill of complaint and by submission on motion to dismiss the bill and supplemental bill were admitted on the final hearing. Assuming the statute to be valid, an order of the Commission denying leave to remove would, on these facts, clearly have violated the commerce clause. . . . The Commission's refusal to hear the application was tantamount to such an order. The Railway was not in contempt. The terms of the restraining order had been superseded by the interlocutory injunction. To refuse to hear the application, which the District Court had directed the Railway to make, was an attempt to inflict punishment for an innocent act.

The case was argued by Mr. C. B. Hines for the appellants and by Mr. C. B. Stuart for the appellee.

Carriers—Liability for Fraud of Agent

A carrier is liable to one who pays a draft in reliance upon a false statement of its agent, made in the course of his employment, even though such statement was made solely in furtherance of a scheme by the agent to induce payment of the draft which he had forged.

Gleason v. Seaboard Air Line Ry. Co., Adv. Op. 121; Sup. Ct. Rep. Vol. 49, p. 161.

The agent of the defendant railway company, one McDonnell, was under a duty to notify persons engaged in the cotton trade of the arrival of cotton under "order notify" bills of lading. Ostensibly acting in accordance with this duty he notified the plaintiff of the arrival of cotton described in a bill of lading and in reliance upon this notice and upon the apparent regularity of the documents the plaintiff paid a draft for $10,000. Without the notice the plaintiff would not have paid the draft. The draft and bill of lading had been forged by McDonnell in furtherance of a scheme to defraud the plaintiff of the amount of the draft.

The plaintiff brought an action against the railway company for the deceit of its agent in giving the false notice which induced payment of the draft. The plaintiff got a verdict and judgment in the district court. This the Circuit Court of Appeals reversed upon the ground that an employer is not liable for an agent's false statements made solely to effect a fraudulent design for his own benefit and not for his employer, or the latter's business. This was reversed on certiorari in an opinion delivered by MR. JUSTICE STONE.

The Circuit Court of Appeals relied upon the authority of *Friedlander v. Texas & Pacific Ry. Co.* There the wrongful act of the agent was the issuance of a bill of lading for goods which had not been received. The company was held not liable. There the Court said:

". . . Nor is the action maintainable on the ground of tort. 'The general rule,' said Willes, J., in Barwick v. English Joint Stock Bank, L.R. 2 Ex. 259, 265, 'is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved.' See also Limpus v. London General Omnibus Co., 1 H. & C. 526. The fraud was in respect to a matter within the scope of Easton's employment or outside of it. It was not within it, for bills of lading could only be issued for merchandise delivered; and being without it, the company, which derived and could derive no benefit from the unauthorized and fraudulent act cannot be made responsible. British Mutual Banking Co. v. Charnwood Forest Railway Co., 18 Q.B.D. 714."

After noting that the Federal Bills of Lading Act has modified the rule announced and followed in the *Friedlander Case* in respect of the issuance of bills of lading the Court continued:

But the above quoted passage from that case, taken in conjunction with other references in the opinion to the fraudulent conduct of the agent for his own benefit, has been regarded as authority for the broader rule applied by the court below, and the present case must turn upon the sufficiency of the rule thus announced. For there was here no want of authority in the agent. His power to act for his principal was not contingent upon any act or omission of another. From the verdict, we must take it that it was his duty unconditionally to answer the inquiry of petitioner as to the arrival of the goods, and concededly, if acting within the scope of his employment, the respondent would have been liable, however flagrant the agent's act, had it not been tainted by his selfish motive.

Following an observation that the weight of authority opposed the limitation imposed on the principal's liability and that cases supposedly contra involved expressions merely *obiter dicta* the opinion continued with an exposition of the rationale of vicarious liability and its implications as follows:

And we think that the restriction of the vicarious liability of the principal adopted by the court below is supported no more by reason than by authority. Undoubtedly formal logic may find something to criticize in a rule which fastens on the principal liability for the acts of his agent, done without the principal's knowledge or consent and to which his own negligence has not contributed. But few doctrines of the law are more firmly established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of his own. . . The tendency of modern legislation in employers' liability and workmen's compensation acts and in the Bills of Lading Act cited and of judicial decision as well, has been to enlarge rather than curtail the rule.

Granted the validity and general application of the rule itself, there would seem to be no more reason for creating an exception to it because of the agent's secret purpose to benefit himself by his breach of duty than in any other case where his default is actuated by negligence or sinister motives. In either case the injury to him who deals with the agent, his relationship and that of the principal to the agent's wrongful act, and the economic consequence of it to the principal in the conduct of whose business the wrong was committed, are the same.

The arguments in favor of creating such an exception are equally objections to the rule itself. Holmes, The Common Law (1882) 231 n. 3. But as we accept and apply the rule, despite those objections, we can find no justification for an exception which is inconsistent both with the rule itself and the underlying policy which has created and perpetuated it. We think that the *Friedlander* case should be overruled so far as it supports such an

exception and that the judgment of the court of appeals should be reversed.

The opinion was concluded with a disapproval of the view urged that Sec. 22 of the Bills of Lading Act had impliedly approved the supposed rule of the *Friedlander* case by legislating on the subject and failing expressly to abolish it. It was pointed out that Sec. 22 enlarged the principal's liability where the bill of lading had issued without receipt of the goods, while here liability was predicated upon a false statement, rather than wrongful issuance of a bill of lading.

> Congress, by enlarging, in a bills of lading act, the implied authority of an agent to issue bills of lading, can hardly be said to have dealt by implication with a general rule of liability applicable in other classes of transactions not involving bills of lading.

MR. JUSTICE SUTHERLAND concurred in the result.

The case was argued by Mr. Edward Brennan for the petitioner and by Mr. E. Ormonde Hunter for the respondent.

Bankruptcy—State Insolvency Laws—Effect of Discharge

Proceedings in a state court under a state insolvency statute intended to discharge the debtor will not preclude a judgment creditor from recovering the full amount of his judgment out of funds in court in the state proceeding, even though the creditor did not institute proceedings in bankruptcy, where the judgment is so small that bankruptcy proceedings cannot be brought by the creditor without the aid of other creditors.

International Shoe Co. v. Pinkus, Adv. Op. 132; Sup. Ct. Rep. Vol. 49, p. 108; Am. B. R. (N. S.) 108.

This opinion dealt with the effect of the Bankruptcy Act upon state insolvency laws. The plaintiff company obtained a judgment in August, 1925, against the insolvent debtor for $463.43. The debtor's debts were in excess of $10,000, his assets less than $3,000. The day the judgment was entered the debtor began a suit in a chancery court in Arkansas to be adjudged an insolvent, for the appointment of a receiver and for the distribution of his assets pursuant to the state insolvency law. This was decreed as prayed, and the receiver was ordered to pay claims in a stated manner and then "the claims of those who have duly filed their claims with the above stipulation, if enough funds are in your hands to pay the same, and lastly . . . to pay any and all other claims of creditors, or so much as the funds . . . will pay, all creditors of the same class receiving an equal percentage of the funds."

After execution had been issued and returned unsatisfied the plaintiff brought this suit against the insolvent and the receiver. This suit was brought upon the theory that the state statute had been suspended by the passage of the federal Bankruptcy Act. But the state court of first instance held that it failed to state a cause of action, and the Supreme Court of Arkansas affirmed. On writ of error this was reversed by the Supreme Court, three Justices dissenting without opinion.

The question involved and certain general rules were stated by MR. JUSTICE BUTLER as follows:

> The question is whether, in the absence of proceedings under the Bankruptcy Act, what was done in the chancery court protects the property in the hands of the receiver from seizure to pay the judgment held by plaintiff in error.
>
> A state is without power to make or enforce any law governing bankruptcies that impairs the obligation of contracts or extends to persons or property outside its jurisdiction or conflicts with the national bankruptcy laws. . . .
>
> The Arkansas statute is an insolvency law. It is so designated in its title (Acts of Arkansas, 1897) and in the revision. . . . The supreme court of the State treats it as such. . . . It provides for surrender by insolvent of all his unexempt property (Sec. 5885) to be liquidated by a trustee for the payment of debts under the direction of the court. It classifies creditors, prescribes the order of payment of their claims and gives preference to those fully discharging the debtor in consideration of pro rata distribution (Sec. 5888). . . .
>
> The state enactment operates within the field occupied by the Bankruptcy Act. The insolvency of Pinkus was covered by its provisions. He could have filed a voluntary petition. His application to the state court for the appointment of a receiver was an act of bankruptcy, Sec. 3 (a), U.S.C., Tit. 11, Sec. 21 (a); and, at any time within four months thereafter, three or more creditors having claims amounting to $500 or over could have filed an involuntary petition. Sec. 59 (b) U.S.C., Tit. 11, Sec. 95 (b). We accept the statement made in the brief submitted on behalf of Pinkus that he had been discharged in voluntary proceedings within six years prior to the filing of the petition in the chancery court. Therefore he could not have obtained discharge under the Bankruptcy Act, Sec. 14, U.S.C., Tit. 11, Sec. 32, and, in proceedings under that Act, all his creditors would have been entitled to participate in distribution without releasing the insolvent as to unpaid balances.

Attention was called next to the paramount power of Congress to establish uniform laws relating to bankruptcy throughout the United States and to the rule that the purpose to exclude state laws may be manifested without express declaration. The implied exclusion was thought plain here, and the confusion inevitably following a contrary view was emphasized.

The opinion then continued:

> It is clear that the provisions of the Arkansas law governing the distribution of property of insolvents for the payment of their debts and providing for their discharge or that otherwise relate to the subject of bankruptcies are within the field entered by Congress when it passed the Bankruptcy Act, and therefore such provisions must be held to have been superseded. In *Boese v. King,* this Court, referring to the effect of the national Act upon a state insolvency law similar to the Arkansas statute under consideration, said: "Undoubtedly the local statute was, from the date of the passage of the Bankrupt Act, inoperative in so far as it provided for the discharge of the debtor from future liability to creditors who came in under the assignment and claimed to participate in the distribution of the proceeds of the assigned property.

The state court had thought the proceeding to be of the same effect as an assignment for the benefit of creditors. But the unsoundness of this was thought plain from the fact that the property was transferred not merely for payment of debts as far as it would go, but under a decree imposing conditions intended to discharge the insolvent. Without giving a full release the plaintiff here could not have secured more than a fraction of its claim. Furthermore, since the claim was for less than $500 the plaintiff could not have proceeded alone under the Bankruptcy Act, and all other creditors had joined in the state proceeding.

The fact that the plaintiff was precluded from invoking the jurisdiction of a federal bankruptcy court without the cooperation of other creditors was emphasized as the element in the case distinguishing it from *Boese v. King,* relied on by the state court. There the creditors, being able to proceed under federal law, had failed to do so, and after the expiration of the time for so doing were held to be precluded from recovering judgment for the full amount of their claims against the debtor who had made the assignment.

The opinion was concluded as follows:

> As all the proceedings were had under the Arkansas insolvency law, we need not decide whether, independently

of statute, an assignment for the benefit of creditors on the conditions specified in the decree would protect the property of the insolvent from seizure to pay the judgment. And, as the passage of the Bankruptcy Act superseded the state law, at least insofar as it relates to the distribution of property and releases to be given, plaintiff in error is entitled to have its judgment paid out of the fund in the hands of the receiver.

MR. JUSTICE MCREYNOLDS, MR. JUSTICE BRANDEIS, and MR. JUSTICE SANFORD were of opinion that the decree of the state court should have been affirmed.

The case was argued by Mr. J. D. Williamson for the plaintiff in error, and by Mr. Lamar Williamson for the defendants in error.

Taxation—Estate Taxes

The corpus of a trust created before the enactment of a statute imposing an estate tax, but not in contemplation of death, must be included as part of the gross estate in determining the net estate taxable, where the income for life and the power to revoke are reserved solely to the deceased settlor, and on his death the income is to be paid to a certain beneficiary.

But where the income is payable to beneficiaries for life and at or after death to the remaindermen, and the settlor had no power to modify or alter the trust, except jointly with the beneficiary, the corpus is not to be included in the gross estate.

Reinecke vs. Northern Trust Co., Adv. Op. 117; Sup. Ct. Rep. Vol. 49, p. 123.

This controversy involved the taxability of the corpus of seven trusts under Sec. 401 and 402 of the Revenue Act of 1921. The facts involved make it convenient to consider two of the trusts in one class and five of them in another.

Of the two trusts here one was created in 1903 and one in 1910. Under their terms the income was reserved to the settlor for life and on his death it was to be paid to a beneficiary until termination provided in them. Both reserved to the settlor alone the power of revocation, and upon the exercise of such power the corpus was to be returned to him.

In the case of the five trusts all were created before enactment of the Act of 1921, but after enactment of the Act of 1918 containing similar provisions relating to estate taxes. By the terms of these trusts life interests were created terminable at fixed times after the death of the settlor, with remainders over on termination. The settlor reserved various managerial powers together with power "to alter, change or modify the trust," but the exercise of this latter power could be exercised only by the settlor and a beneficiary, or in one case by the settlor and a majority of the beneficiaries.

It was conceded that none of the trusts had been created in contemplation of death.

The statute, in Sec. 401, imposes a tax "upon the net estate" of a decedent. In determining the net estate, Sec. 402 directs that there shall be included in gross estate all property—

> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act) . . ."

The foregoing facts constituted the case made by the executor in a suit to recover a tax assessed and collected upon a decedent's estate, the corpus of the trusts having been included in the gross estate. The district court, on demurrer, gave judgment for the executor for the amount thus claimed to be due and the Circuit Court of Appeals affirmed. The Supreme Court then reviewed the case on certiorari and reversed the case as to the two trusts where the uncontrolled power of revocation had been reserved, but affirmed as to the five trusts, in an opinion delivered by MR. JUSTICE STONE.

The executor argued that under *Nichols v. Coolidge*, the tax as to the two trusts was unconstitutional, because retroactive. This contention was rejected, however, upon the ground that the transfer here differed because not complete until the death of the settlor, and therefore not complete until after enactment of the statute. Referring to *Nicholas v. Coolidge*, the Court said:

> In that case it was held that the provisions of the similar Sec. 402 of the 1918 Act, 40 Stat. 1097, making it applicable to trusts created before the passage of the act was in conflict with the Fifth Amendment of the federal Constitution and void as respects transfers completed before any such statute was enacted. But in No. 77, *Chase National Bank v. United States*, — U. S. —, decided this day, the decision is rested on the ground, earlier suggested with respect to the Fourteenth Amendment in *Saltonstall v. Saltonstall* . . . that a transfer made before the enactment of the statute now in question and subject to a power of revocation in the transferor, terminable at his death is not complete until his death and hence Sec. 402, as applied to it, is not retroactive where his death follows the passage of the statute. For that reason, stated more at length in our opion in *Chase National Bank v. United States*, we hold that the tax was rightly imposed on the transfers of the corpus of the two trusts and as to them the judgment of the court of appeals should be reversed.

With respect to the five trusts the executor asserted that Sec. 402 by its terms did not impose a tax on the transfers made, and that even if it did, since they were made prior to the Act of 1921, the provision was retroactive and void, corresponding sections of the 1918 act notwithstanding. The government's argument was twofold: (a) that the reserved power to manage and to modify did not terminate until the death of the settlor, and that consequently Sec. 402 was not retroactive as to them; and (b) that disregarding the powers reserved, the remainder interests were all taxable under Sec. 402, because "intended to take effect in possession or enjoyment at or after" the settlor's death.

Both contentions urged by the government with respect to the five trusts were rejected. The reasons for rejecting the first were thus stated:

> If it be assumed that the power to modify the trust was broad enough to authorize disposition of the trust property among new beneficiaries or to revoke the trusts, still it was not one vested in the settlor alone, as were the reserved powers in the case of the two trusts. He could not effect any change in the beneficial interest in the trusts without the consent, in the case of four of the trusts, of the person entitled to that interest, and in the case of one trust without the consent of a majority of those so entitled. Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute.
>
> Nor did the reserved powers of management of the trusts save to decedent any control over the economic benefits or the enjoyment of the property. He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been incomplete. The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made. His power to recall the property and

(Continued on page 250)

WASHINGTON JUDICIAL COUNCIL MAKES RECOMMENDATIONS

IN 1925, the Washington State Bar Association, at its annual meeting held at Seattle, went on record favoring the organization of a judicial council, and a committee was appointed to secure the passage of a bill authorizing the same. The legislature passed the bill at an extraordinary session four months later. The usefulness of this judicial council in finding and correcting faults in the administration of justice is indicated by its latest biennial report. The appointment of commissioners to assist the Supreme Court, the establishment of an appellate tribunal, amendments in the rules of procedure, and a new definition of the crime of manslaughter to meet the menace introduced by the modern automobile, are among the recommendations made in the report.

The Washington Judicial Council consists of nine members, the chief justice and one other justice of the Supreme Court, two Superior Court judges, two members of the legislature, and three members of the bar, one of whom is a prosecuting attorney. The duties of this council include the survey and study of the operation of the judicial department, the consideration of suggestions for correcting the faults in the administration of justice, and the making of recommendations for improvement. The act creating the council also provided that a biennial report should be made to the governor and legislature on the condition of business in the courts with recommendations as to needed changes in organization or procedure. The present report is the second of these biennial reports, and covers the years 1927 and 1928.

Survey of Judicial Business

The first major problem covered by the report concerns the arrangement of the judicial districts of the Superior courts. In 1927, the legislature, feeling that the present arrangement was "in a number of instances inconvenient and uneconomical," had requested the Judicial Council to make a survey of the arrangement of the districts, with a view to re-districting, and to make recommendations in its biennial report.

The Council undertook this survey, and found that there was indeed great disparity and inequality in the volume of business transacted and in the time spent in the transaction of the necessary business in the various judicial districts. However, the council's report recommends no re-arrangement of the districts, but says:

"The Judicial Council has considered the results of this survey and is of the unanimous opinion that it is not practicable at the present time to attempt any general re-districting of the superior courts of the state. It is the opinion of the Council, however, that this survey establishes beyond question that many of the judges from the smaller districts are available for a substantial part of the time to aid in relieving the congestion in the larger centers of population. It is the further opinion of the Council that the present number of superior court judges of the state of Washington is sufficient to dispatch the judicial business of the state, if the proper means are afforded to expeditiously transfer the judges from one county to another as the business of the courts requires."

The Washington constitution, the report points out, provides that at the request of the governor, it is the duty of any superior court judge to hold court in any county. This constitutional power, says the report, cannot at present be exercised by the governor in an efficient manner, because there is no reasonable means by which he can be apprised of the condition of the judicial business in the superior court. The report accordingly recommends a system of reports, to be transmitted to the governor:

"It is the belief of the Council that if the Council is authorized to obtain periodical reports from the various superior courts concerning the state of business of each county, that such information, if transmitted to the governor, would materially expedite judicial business by giving to the governor accurate information of existing conditions, to the end that he could assign judges to duty in other counties where relief is necessary.

"The Council therefore recommends that legislation be enacted making it the duty of the various superior courts, and all county officers having any connection with judicial business, to furnish periodically to the Council full information concerning the state of judicial business in the respective counties upon request of the chairman of the Judicial Council."

Changes in Rules of Practice and Procedure

In 1925, the legislature granted the Washington Supreme Court the power to make rules relating to pleading, procedure and practice in the courts of the state. Pursuant to this power, the Supreme Court in 1927 adopted a set of eleven rules, in the form which had been recommended by the Judicial Council in its first biennial report. Now in its second report, the Council calls attention to two defects in the rules.

The first concerns the length of time after the service of summons that the deposition of a defendant can be taken. The Council recommends an amendment to subdivision 5 of Rule VIII, providing that such deposition shall not be taken until the expiration of twenty days after the service of summons. The reason for this change is given in a letter from the Executive Secretary of the Council, notifying the Supreme Court of its recommendation:

"With references to the recommended change to Subdivision 5 of the Rule VIII, it will be observed from a reading of the rule in its present form that there is nothing to prevent the taking of the deposition of a defendant immediately upon three days notice after the service of process upon him. This does not allow the defendant or his counsel sufficient time to properly prepare for the taking of the deposition, and the Judicial Council has received several complaints of the abuse of the rule in this respect with a resulting undue hardship upon the defendant and his counsel.

"Before the Council finally acted upon this proposed change the advice of all organized Bar Associations of the state was solicited, and it was the opinion of all the Bar Associations, who responded, that the rule should be modified so as to prevent the taking of the deposition of the defendant until the expiration of an arbitrary time limit. While there was a variance in opinion as to what this time limit should be, the Judicial Council, after a very careful consideration of the matter and of the opinion of the various Bar Associations who responded to our inquiry, has decided that the time fixed in the proposed change

is fair to the defendant and still will not unduly hamper the operation of the rule."

The Council's recommendation as to adding the amendment to the rule was adopted by the Supreme Court Nov. 22, 1928, says the report.

The second recommendation of the Council in regard to the rules of procedure was that the law providing for the exchange of names of witnesses before trial be abrogated. A Washington statute passed in 1925 provides that at the time a case is set for trial, the prosecuting attorney shall file a list of the witnesses he intends to use, and five days thereafter, the defendant shall file a similar list of his witnesses. Under the Rule Making Act, the Supreme Court has power to abrogate inconsistent laws, and the Judicial Council's report recommends that this provision be abrogated by the Supreme Court, because "the Council is of the opinion that the disadvantages resulting from the present operation of the statute greatly overcome any possible benefits thereof." The recommendation, says the report, has not yet been acted upon by the court.

Relief of the Supreme Court

The Supreme Court of Washington, says the report, "is now burdened with a volume of work greater than that imposed upon any other court in the nation," and the problem of how to relieve the court of this increased volume of work constitutes the third major question dealt with in the Judicial Council's report. As early as 1927, the Council had sponsored constitutional amendments restricting the right of appeal. These proposed amendments were presented to the State Bar Association at its 1927 meeting. The resulting discussion, pro and con, among members of the Bar convinced the Council that "for the present at least a restriction of the right to appeal is hardly practicable."

To find other possible solutions to the perplexing problem, the Council requested the assistance of Dean Alfred J. Schweppe of the University of Washington Law School, who prepared a painstaking report, which is included in the Council's report. Dean Schweppe discussed five different methods which have been used in various states for the relief of the higher courts:

1. Creation of additional judges for the Supreme Court and/or the addition of another department thereto.
2. The creation of Supreme Court Commissioners.
3. The establishment of an intermediate appellate court.
4. The restriction of the jurisdictional amount in controversy.
5. Change in the method of appeal without raising the jurisdictional amount.

The solution which the Judicial Council recommends for adoption in the state of Washington is stated in the report as follows:

"After full consideration of the subject by the members of the Judicial Council, it was determined that the Council recommend as a temporary measure for immediate relief, that four commissioners be appointed to assist the Supreme Court, and that, as a measure of permanent relief, a constitutional amendment be recommended establishing an intermediate appellate court. This latter recommendation was made after a careful study of intermediate appellate courts the country over, and an extensive correspondence with over one hundred leading lawyers and judges in all of the states of the Union having intermediate appellate courts."

General Recommendations

In addition to the detailed discussion of these three major problems, the report of the Judicial Council also calls attention to needed legislation on three other subjects.

The law relative to the guardianship of minors, the report points out, is defective in that it provides no sufficient or adequate means for its enforcement. The law requires guardians to account to the court at least once in every two years, but there is no method of checking up on whether this requirement is fulfilled. The result is that a guardian often dissipates the minor's entire estate, and, of course, makes no accounting to the court. When the defalcation is discovered, it is often found that both he and his bondsman have both become insolvent, or that the statute of limitation has run. The Council accordingly makes the recommendation that a statute be enacted, making it the official duty of some administrative officer of the county to search the records each year, and report to the proper court the estates in which no report has been made within the two-year period.

The elimination of the right to a trial by jury in proceedings against juvenile offenders is another measure recommended by the Council. The Washington law at present grants to any person interested in a juvenile proceeding the right to demand a trial by jury. The report mentions two undesirable features of a jury trial for juveniles: (1) it gives an undue prominence to the proceedings, thus doing away with the privacy of the hearing, so often essential to the future welfare of the offender, and (2) the offender often gains a wrong impression from the trial, namely, that he is being prosecuted for crime by his enemies, rather than that the persons conducting the hearing are his friends, whose sole object is to promote his individual welfare.

Finally, the Judicial Council calls attention to the need for a change in the statutory definition of the crime of manslaughter. The coming of the automobile, says the Council's report, has rendered the definition of manslaughter which now appears in the criminal code, and which was enacted in 1909, inadequate. "It is a truism which cannot be successfully gainsaid," concludes the report, "that the operation of automobiles over the highways is the greatest single menace to human life that modern innovation has introduced. The general laws regulating the use of automobiles on the public highways, while amply sufficient to protect the public were they even measurably obeyed, provide no adequate punishment for those who wilfully disobey them. . ."

The present members of the Washington Judicial Council are the Hon. Mark A. Fullerton of Olympia, Chief Justice of the State Supreme Court, chairman; the Hon. Judson F. Falknor of Seattle, executive secretary; the Hon. W. W. Tolman of Olympia; the Hon. R. L. McCroskey of Colfax; the Hon. Calvin S. Hall of Seattle; the Hon. Elmer E. Halsey of Clarkston; the Hon. L. L. Thompson of Tacoma; the Hon. Harold B. Gilbert of Yakima; and the Hon. E. B. Palmer of Seattle. Mr. W. J. Millard is recording secretary.

IS ORATORY DEAD TODAY OR IS THERE MERELY A DEMAND FOR NEW STANDARDS?

Occasions That Once Created Profound Feeling and Furnished Orator with Ready Opportunity for Evoking the Emotional Response He Seeks Do Not Now Excite Public Interest —Orator Must Keep Pace with Changing Conditions and Adapt Himself to Them—What Public Demands Today

By Hon. James Hamilton Lewis
Member of Illinois Bar; Former Senator from Illinois

THE address of Hon. H. M. Garwood, of Texas —lately published in the Journal—assuming that "oratory is dead" or that "orators have ceased existence," causes me to reply by asking: Is such due to want of capacity in speakers, or lack of inclination to indulge in beauties of speech? It becomes interesting to reflect on what is the real reason for this advent of slothfulness or economy of speech in the calling of the advocate or the address of public men, so clearly indicated by Judge Garwood's treatise.

I answer: The truth is not that oratory has died, nor that orators have ended. It is that *the standard of oratory has changed.* The occasions that once created emotions do not now strike the "living fire." Events of life and of government which once stirred the blood and aroused the pulsing emotions do not now awaken curiosity, far less enthusiasm.

Conditions once deemed important and forming the basis for electric appeals to the multitude, today, by comparison in the events of life, are insignificant incidents—not awakening passing attention.

Today, with the mechanical apparatus of the hour, transportation facilities, scientific discovery, aerial mechanism, musical and aerial creations aiding commercial adventure, so possess the contemplation and intelligence of mankind, that the former entertainment by long circumlocutory speech to the multitudes reciting events all of which were to them new, would, if attempted now, appeal to the sense of the ridiculous. In such past days no newspapers or magazines informed the public. The orator thus could draw volatile conclusions and explode with inflammatory denunciation as he lifted face to Heaven, pledging vows that would have stuccoed the skies and excited the angels. Such orator in this day, like the moment of Othello is "without occupation." Today the text of life is not that of Keats—"beauty as the occupation of life," but that of Iago to Cassio—"put money in thy purse—honest, if you can, but put money in thy purse."

Past Orators and Present

Let us compare the past orator with the spirit of today. Suppose that Tully Cicero lived in this age and arose in a public place with his speech denouncing Cataline, beginning "Quosque etc."—"Oh, Cataline, how long will you try our patience?" etc. etc.—when the audience knew that Cataline and his crowd were merely street bummers, "booze bandits" of that day, marauding murderers, and knew that as Cicero was speaking the "conspirators" were standing in the porch (as they were) during the address, smirking, knowing that Cicero was bidding for a Consulship and never intended to do an act of any nature other than to fulminate; also knowing that at the time of his denunciation of Cataline he was having a delicate affair with the niece of Cataline (while Cataline was housing the event in his artistic villa beneath the fig leaves). Such an orator would be so laughed at as ridiculous, or denounced as a hypocrite, that in this day he would not get the "applause of the groundlings"—as he "made the judicious grieve."

Suppose this Cicero of Rome, opening his defense of Milo, justifying murder when it removed a political opponent, on the ground that "Milo's ancestor had been at Thermopylea," how the guffaws would resound from the gallery! Or, again, in defending the Lieutenant Governors of the Provinces for stealing millions from the depressed and oppressed taxpayer, justifying on the ground that some of the money would be used for building a little army and supplying it to defend against any encroachments that would poach or trespass upon the privilege of Rome to continue the looting of the inhabitants! Think you that such would be accepted in this day as oratory, particularly when the character of the individual was such that he was known to run away from responsibility and hide himself from a vote on the contest that he had invited by his accusation.

Greece and England

Again, supposing a Pericles of Greece arose to pronounce an encomium upon some soldiers returning from a Salamis and began by saying that "the Gods in heaven had sent a decree choosing these as the select of earth and that never before had there existed mankind their equal, and that never again would there be their peers; that they bore the faces of Gods and the souls of the fairies," etc., etc.—does anyone think this would be applauded as a Fourth of July oration in the park, or received as a captivating figure in a Memorial Day address on World War heroes in the present hour of intelligence?

Of Edmund Burke with his commanding philosophy reduced to writing with the stub of a pencil, beginning with lugubrious and reverberat-

ing sentence, it is recorded that when read from manuscript in the English Parliament, it was designated the "dinner bell"—this because it drove everyone from the audience to lunch. We ask should such an Edmund Burke try this procedure in public place in America—however splendid the sentences for reading might appeal to the spirit of literature and patriotism—the very beginning of the manner of such utterances would again be the "dinner bell" today in any public meeting in America.

A Chatham, a Sheridan, would arrest attention because of the poetry and pyrotechnic flash, though only "flaring for a moment and dying in the spark." Yet such would not convince, not even distract—as we saw similar performances could not in the campaign of the late Candidate of the Democratic Party for the Presidency. Nevertheless, for the moment it would have its allure of light and splendor, but in no wise would it convert or convince.

Patrick Henry, James Otis, should some enemy be upon our shore, or oppression threaten us, could arouse great plaudits with the same denunciation of oppression and the call to liberty as was theirs—this without regard to the form of sentence and phrase—because it was an appeal to the spirit that is innate in the human being in the hour of danger—self preservation.

American Examples

But let us note a later day. Does anyone think that Daniel Webster could expend four days on that part of his speech against Hayne, in the Senate, with any attention given him on the floor of the Senate today, while he expounded in reverberating phrases the meanings of the Constitution which had been expressed hundreds of times in speech and article by those who had written in the name of Madison, Hamilton, Jefferson and Adams? It was only that there was the threat of severance of the Government that incited attention to the dangers prophesied in the discussion. It was only the peroration which Webster confessed he had during six months worked out, while behind his fishing rods, in his walks along lonely roads, or as he sat over his exhilarating glass, and gradually reduced to memory, that keeps alive this monument of majestic expression.

This remains a beautiful period of speech, yet would be meaningless save as words but for the fact that it was addressed to a threat to sever the Union. The same attention would be drawn to a speech this day that referred to a threat to sever limitations of a city—threatened the divisions of a state. But I ask, would Daniel Webster be heard in the Supreme Court of the United States today—as he was heard in the Dartmouth College case—with an argument against the legislative right to make changes in a charter and its provisions of control beginning: "It is a little college but I love it."

How ridiculous would such a suggestion now appear, and how the Judges would smirk and possibly Justice Holmes would be heard breaking in with, "but Mr. Webster, what is the Federal question?" Jeremiah Mason, leading counsel of New Hampshire, had prepared the argument for Webster upon the theory that the charter of the college was equivalent to a contract of permanent exemption from control. This was then successful—but now overruled, and for years past flouted and discredited by the Supreme Court one hundred and fourteen times. It is not even intimated as law. The theory that a State or Government has a right to reach any property it protects in a just proportion to its bearing is the only law that could be heard with respect in any of our tribunals. Yet we hear much about "Webster's great argument in the Dartmouth College case."

This was because at that time there was a sort of aura surrounding Webster because of the attitude in the North and East in favor of his positions on the Union, against that unhappy and misguided doctrine of certain of the Southern and New England States of division and secession.

Let us note Robert Toombs of Georgia, heralded as the "great Demosthenes" because he proclaimed, "I will call the roll of my slaves at the foot of Bunker Hill." Does anyone think this expression today would be eloquence or be treated as more than the ejaculation of a maddening moment or a theatrical thesis in sententious phraseology? Or that of Henry Clay in the Senate anything more in his famous oration denouncing President Andrew Jackson for insisting on an Army of National Defense, condemning Jackson as graduating to a European tyrant—"bringing America to her downfall as a military monarchy."

Two Senators

Contemplate Demosthenes of Greece winning the prize of Ctesiphon at Athens in an oration by *boasting of himself* and praising the different things he had done of claimed superiority to his opponent Eschines. I mention Demosthenes at this point to call attention to the fact that a Senator of the United States under criticism during the debates of the World War, took the same attitude of self praise in declamatory effusion in behalf of himself. The laughter of the gallery had to be suppressed by the President of the Senate, and the present writer of this article as the then vested agent of one of the political parties of the Senate, was compelled on the floor to invoke his office as "Whip" to induce the attention of Senators and to hold them to their seats to hear this particular Senator through to his conclusion.

Brother Garwood, and the very able editorial in the Chicago Tribune upon this question of the decay of oratory, overlook for a moment I fear, how the standard of nature has changed in oratory as in everything else. It is overlooked that today's real oratory would be very influential today. That the real orator would be effective today if the method were fitted to the temper of the times. This temper is to demand that the statement be reduced to succinct assertion; to moulded aphorism, to a didactic declaration on the thing in hand; then moving rapidly to the conclusion demanded, and resting the audience with what Shakespeare pleaded with his orators to adopt—"the full stop." Let me assure American mankind that during the World War discussions, pending the arguments on the League of Nations, the Peace Treaty, and the relations of our America with the world, there were orations in both House and Senate that in style and beauty, in substance and power, were more than the equal of the best of the past. Many were superior to those boasted in ancient and modern history as marvelous and sublime.

Remember that Lincoln's Gettysburg speech was not delivered to the multitude as oratory.

The crowd did not hear it. It was read from his notes written on the back of envelopes. It was only after two days' printing in newspapers following the event that this apostrophe to sublime service to country by heroic souls was discovered. Here we beheld the perfection of English composition in the celestial spirit of winged words. It was thus that the Oration of the occasion by the chosen orator of the celebrations was submerged in the grandeur of the Lincoln apostrophe.

The Neglect of the Present

May I call attention that not so very many years past a lawyer from Chicago, who had expended his very life's blood in labor in a cause of great importance from his viewpoint, finally was given his opportunity and made his argument before the Supreme Court of the United States. The writer can speak of what transpired on the occasion —terror, fright, anxiety. All counsel in the cause centered upon the result of their own arguments. When the case had concluded, we have it from Mr. William Eleroy Curtis, in his late splendid volume on "The True Thomas Jefferson" (page 290), touching the question of oratory and the change of time, who said (as an indication of the changing conditions and what makes comparisons impossible now) "when we reflect upon the orators of the yesterdays and the long ago and those of today, I am able to certify that not long ago after a certain lawyer from Chicago made his first appearance in a big case before the Supreme Court of the United States, and carried on and completed his arguments, the Judges later assembled for consideration of the cause when the Chief Justice said, 'If that argument had been delivered a century ago it would have given that man a national reputation . . . today it will pass unnoticed except by the clients who were present hearing him, and such members of the court as are given the opportunity to consider it.'"

Contemplate today the practical state of the political mind, composed in prosperity. Does any think Mr. Bryan by his "Cross of Gold" speech as made in the 1896 Democratic National Convention could awaken any emotion—far less action—in this hour of the people's content? It was because the state of the public mind was one of desolation and distress in the financial panic of the years 1895 and 1896—and the bankruptcy of the farmers. The speech of Mr. Bryan had been made by Mr. Bryan fifty times through different parts of the country before the meeting of the Convention, Mr. Bryan delivering it to the people as speaker for the "Silver League" on the issue of gold or silver. The only new portion added to it in the Convention was as to which delegation from Nebraska should be seated—the one for gold and President Cleveland or for Bland of Missouri and silver—and anti-Cleveland. There in the excitement of resentments, the delivery won a Presidential nomination. Today it would have won admiration for phraseology, and quick rejection as either statesmanship or philosophy of Government. Today it would be dismissed as declamation.

It Is Hamlet to the Players

Therefore, the conclusion is that unless the orator of today has moved along with the advanced standards of his country and observed that an immediate solution of the pending problem is demanded within the shortest serviceable space of time, he fails of first sense. That to this object, the matter must be put at once in such phraseology as to be simple and sufficient—such as requires neither embellishment to adorn it nor needs exemplification to explain it. Without this guide the orator will not get far in victory or appreciation. Hardly would he start the old method of "exordium, explanation, compliments, and laying down the proposition," when, to use the words of the Tribune editorial, "the audience would grab their hats," to which I add that also the radio audiences would turn on the jazz to be refreshed in the inspiring melody of "Honey if you ain't won me now you'll not get me in the future." And now I say to Brother Garwood that the next time he wishes to ask where is oratory or orators, we who reflect upon his classic article and recall his splendid orations will reply to Brother Garwood in the language of the Greek—"Know Thyself."

Federal Trade Commission Not Ignoring Anti-Trust Violations

"The Federal Trade Commission, in its administration of the trade practices laws, is not ignoring antitrust violations, nor is the Commission inclined to deal gently with them, particularly those involving price-fixing, it was declared February 21 by W. E. Humphrey, a member of the Commission, in the course of an address at the annual meeting of the American Paper and Pulp Association in New York City.

"Mr. Humphrey's statement was made, he said, to clear the air of whispers and 'confidential' rumors that the Commission was inclined to look 'if not with a friendly eye, with an unseeing eye, upon certain unlawful practices, especially price-fixing.'

"Such a view, he continued, is entirely contrary to fact, and never in the history of the Commission have violations of the law met with stronger condemnation. There is less excuse to violate the anti-trust laws than ever before, he explained, as recent decisions of the Supreme Court have cleared away many uncertainties. For this reason, if for no other, Commissioner Humphrey declared, the Commission has little tolerance with violations.

"The speaker explained also that there had been a tremendous improvement in the conduct of business in the United States. The policy of the Commission, he explained, is to help honest business and to preserve the traditional policy of fair competition.

"Discussing the subject of false and misleading advertising, Mr. Humphrey recalled the recent trade practice conference in which the representatives of 6,000 periodicals voluntarily adopted a plan on advertising, which, he said, he believed will do more to clean the columns of the magazines of this country of shameless advertising 'than any other plan that the Federal Government has ever tried.'"—*From United States Daily, Feb. 23.*

Beauty of Building Design a Governmental Obligation

"The Federal Government is under an obligation to take the leadership in establishing beauty of design as well as practicality of use in the buildings it constructs, and those responsible for carrying out the $300,000,000 building program are fully cognizant of the traditional standards which must be met, according to the Undersecretary of the Treasury, Ogden L. Mills.

"Speaking at the annual dinner of the American Institute of Architects in New York, February 25, the Undersecretary declared that 'certainly no one so well as the Government itself can set a standard of good taste in architecture and establish it.' He called attention to the farflung operations of the Government, explaining that wherever the Federal Government erected a building, it was likely to influence the architecture of the locality.

"Mr. Mills recounted the struggle which the so-called Washington and L'Enfant plan for development of the National Capital had had and the approach of a successful conclusion of efforts to carry out that plan."—*From United States Daily.*

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

THE Making of the Constitution, by Charles Warren, 1928, Boston: Little, Brown & Company. pp. XII, 832. In this scholarly and entertaining work on "The Making of the Constitution" Mr. Warren has rendered a distinct service to students of the origin of our fundamental law. It covers a field of its own. We have volumes on the Constitution, interpretative and critical, and of course Madison's notes, which are invaluable, but it has been reserved to Mr. Warren so to tell the dramatic story of the framing of the fundamental law as to make possible the visualization of the struggle from day to day. Mere names become real men, and many myths and misrepresentations, born of the Federalistic interpretation or misinterpretation of history, are wiped out.

The plan through which this is achieved is so simple that one wonders why no one thought of it before. The proceedings were in secret, and in the voluminous correspondence of the members it is amazing to find with what stern fidelity the injunction of secrecy was respected. In the Madison letters, frequently quoted, it is evident that the father of the statesman could not be persuaded that the son could not in the privacy of a family letter give some inkling of what was transpiring. Madison's replies were never satisfactory. And so with the others. Mr. Warren has combed the sources for all the letters written during this period by the delegates, and not one indicates a betrayal of the seal of secrecy.

Thus in his day by day description of the discussions Mr. Warren has been forced to rely on the Madison and Yates notes. It is in the second division of his plan that the illumination comes in. The first gives us the proceedings behind closed doors; the second gives us the letters written by delegates on the days of these proceedings, the press comments and articles of these days, and such reactions of the outside public as were manifest. Thus, where the bare recital of the proceedings does not disclose the effect upon the members, the personal letters written often give us the impression made without a deviation from the injunction. We read in the first division that this, or that, subject was debated; in the second division we learn the impression as to success or failure made. And with it we get the impression made outdoors. In no other way could the national mind so clearly be reflected day by day throughout the epochal debates.

Mr. Warren has clung to his sources regardless of the effect on cherished myths that have been built up through the years. The popular impression created in the schools is that the outstanding, commanding, dominating figure in the Convention was Alexander Hamilton. Note the subjects chosen by the high school students in the oratorical contests on topics pertaining to the fundamental law. Of course nothing is more remote from the truth. He spoke but seldom, and was absent a very large part of the time. Mr. Warren's account of Hamilton's speech outlining his plan conclusively shows how hopelessly out of sympathy he was with the scheme finally agreed upon. The author however quotes Benton, who was certainly not present, as saying that while Hamilton urged "propositions stronger than those adopted" he proposed "nothing like those which party spirit attributed to him". We are not so sure of that. There is scarcely a thing "attributed to him" that is not justified by Hamilton's own brief of his speech published from the original by his own son in the biography he produced more than a century ago. However Mr. Warren does not seek to sustain the myth, and at the proper place quotes Hamilton's explanation of his vote that "no man's ideas were more remote from the Plan than his were known to be". He supported the Plan, however, because it was a choice "between anarchy and convulsion on one side and the chance of good to be expected from this plan on the other". The contribution of Hamilton was in securing the ratification of the Plan, not in its creation.

Quite properly James Madison emerges from this vivid volume as the outstanding thinker in the Constitution. Among the contemporaries of the delegates he was known as "the Father of the Constitution", but his party affiliations in the first days of the Republic prejudiced his claim with the Federalists, and he has never recovered his rightful place in the popular mind. Not only was he the most useful member in the Convention; he, like Hamilton, wrote the Federalist papers; and if he wrote fewer it was due to the necessity of personally organizing sentiment for ratification in Virginia. To one of his shy disposition it would have been far more comfortable to have written on the Federalist in the seclusion of his closet than to have faced controversial crowds on the platform. He took the hardest way. And his work in the Virginia Convention was just as important as that of Hamilton in New York. Indeed the latter had less dangerous opponents in debate. There was no Patrick Henry and no George Mason in New York.

One of the effects of this volume is to give Madison his rightful place. Another is to bring forward Oliver Ellsworth, future Chief Justice, and Roger Sherman, whose genius for compromise actually saved the Convention from failure in effecting an accommodation of the differences between the larger and the smaller States. Morris, of New York, appears in a more favorable light. And Charles Pinckney of South Carolina is given proper recognition. Like Madi-

son, he fell foul of a partisan interpretation of history because of his affiliation with Jefferson. One of the youngest of the delegates, his speech of June 25, 1787, is here characterized: "With the exception of those by Madison and Wilson, no such powerful, eloquent and brilliant contribution had been made."

Apropos of this justice to Madison and Pinckney, Mr. Warren has likewise played havoc with the favorite fallacy of a certain school of historians that Jefferson was not in sympathy with the Constitution. This has deceived no one except the groundlings, for the record is plain and easily found. He was in Paris during the Convention, though in correspondence with his friends, notably Washington and Madison, and he set forth his views clearly in his letters. Happily the plan of Mr. Warren to give us the reactions outside, through letters written, has brought Jefferson's position into a white light. Long before the Convention acted he had declared for the three coordinate branches of the government; and his only objections to the document when completed were that he would have made the President ineligible for reelection and have incorporated a Bill of Rights. The first objection he soon abandoned; he never abandoned the second until the Amendments were added. It is well to bear in mind that as far as human rights are concerned the Bill of Rights is all the Constitution offers. Eliminate these Amendments, for which Jefferson contended, and which Madison soon offered, and this government under the Constitution could be converted into a despotism.

In connection with Jefferson's contributions Mr. Warren calls attention to "a striking fact which has not been emphasized by historians"—that "the first suggestion that the proper method of curbing State laws violative of the Constitution lay in the Judiciary, came from Thomas Jefferson." It was in a letter to Madison, June 20, 1787, that he urged the plan.

Thus running all through these eight hundred illuminating and entertaining pages are interesting and important revelations. The reader catches through the letters and press comments, as well as the discussion indoors, the very throb of public opinion in the making; realizes as never before the delicacy of the task before the delegates; and comes to a keener appreciation of the marvelous genius of this amazing assembly of men. Through the letters he sees the inner working of the minds of the founders; follows them to their lodging places and entertainments, and names become personalities in the process. That a work by the author of *The Supreme Court in United States History* would be a scholarly, thoroughly documented production, the fruit of exhaustive research into all available sources, was to be expected. That without sacrificing anything to the sobriety and dignity of the treatment he should be able to make it as fascinating as a piece of fiction is the remarkable thing—the real triumph. Here is a book that will abide, and that should be found in the library of every lawyer and thoughtful layman.

New York. CLAUDE G. BOWERS.

Group Representation Before Congress, by E. Pendleton Herring. 1929. Baltimore. The John Hopkins Press. Pp. xviii, 309. 3—This volume, just issued under the auspices of the Institute for Government Research, will be found of uncommon interest and value to the student of American government and governmental processes. It marks a serious attempt to describe the growth and form of development which has taken place in the ancient right of petition preserved in the Constitution of the United States.

Probably the most considered and reasoned statement of this right, as well as the considerations and good manners which should surround its exercise, was expressed by a Committee of the House of Representatives in the 63rd Congress, house report 113, from which the author quotes:

"Your committee is of the opinion that any individual or any association of individuals interested in legislation pending in Congress has the unquestionable right to appear in person or through agents or attorneys before committees and present his or its views upon and arguments in behalf of or against such legislation; that it is the right of the individual and the mass to appeal to the legislator personally, verbally, if he sees proper to grant an interview, or in writing if he sees proper to read it, and by education and argument seek to convince his judgment and his conscience. This we think is the true spirit of the right of petition guaranteed by the Constitution to the citizens of the Republic. To place the Congressman in a cloister to legislate, rendering him immune to extraneous influences, would be impossible, and, if possible, it would be exceedingly ridiculous. But your committee feels assured that whenever any person or association attempts by secret or insidious means or methods, by either giving or encouraging the hope of other reward than that mental and spiritual exaltation which springs from the consciousness of having walked in the light of honest judgment and followed it to its logical end, or by threats of punishment to be vindictively inflicted, then such methods become a menace to the free exercise of the legislator's judgment and the true performance of his solemn obligation and duty, are improper and merit the severest condemnation."

The author points out the well known fact that the manner, methods, legitimacy and effective presentation of facts and arguments to Congress and the country, whether by group or by individual petition, has as many variations and is subject to the same limitations as the work of groups and individuals in any other field of activity. He notes, however, a groiwng appreciation of the responsibility of such public groups, that they must rely upon facts systematically gathered and accurately checked, and their timely presentation,—their effectiveness to be allowed to rest upon the inherent strength of the case presented.

The author points out the long gap which has been passed since the days of Tom Ward and his gastronomic entertainments, to the cool efficiency with which modern associated groups conduct their cause before the country or before Congress.

It is observed by the author that these representative groups in increasing numbers come to regard their work in the nation's capital more in the light, particularly if they represent business groups, as in the nature of "Ambassadors of American Industry".

Altogether the volume presents a not inadequate picture in this respect of present day Washington, though perhaps the author does not make quite enough of the growing complexity and interminable detail with which the Federal government is now projected into the life of the citizen and his business, which results in such citizen being compelled to integrate himself more intimately with the development and concepts of government, carried on at his expense and oft times to his annoyance if not danger.

The author of this interesting volume having assembled his facts and painted his picture stops short of any attempt at making suggestions as to the probable immediate outcome of these developments of group representation at the nation's capital whereby "permanent central organizations have as one of their primary functions the representation of such interest before legislative bodies".

As is stated by Dr. Willoughby, Director of the Institute for Government Research, in his preface,

"Viewed in the large, the existence and work of these organizations constitute an important element in the national legislative process".

It may well be that the answer to the question "What of the future?" is to be found in the suggestion of advisory councils, found in the volume entitled "Principles of Public Administration", by Dr. Willoughby, 1927, Johns Hopkins Press, wherein is discussed the necessity for a government such as this to maintain, by some proper means, intimate contact with public interests affected by its administrative policies, and wherein he points out "the advantageous use which may be made of councils, partly of officers of the government and partly of persons selected from private life, having for their purpose to consider and give their advice regarding the manner in which problems coming before the administrative services for action should be handled."

Such councils made up of government officers and representatives chosen by and from really representative trade and industry associations may give effect to that necessity in a country so large as this for considered organized opinion to have a definite and accepted avenue of contact with its own agency—government—so necessary if matters of important policy are to have the spirit of the far flung interests of the people as a whole who, in the last analysis, must be expected to make their most effective presentation through economic groups with which their daily labors are identified.

These volumes provoke very interesting observations along these lines and both are well worth thoughtful study.

Washington, D. C. NATHAN B. WILLIAMS.

The Lance of Justice, by John MacArthur Maguire. 1928. Harvard University Press, Pp. xi, 305.—This is a fascinating book. Professor Maguire tells the stories of many cases—the strange, comic, tragic, exciting things that have actually happened in the world's greatest city to men and women and children—all of whom at one time or another during the past fifty years have come for help to the attorneys of the New York Legal Aid Society. These high-lights give life and color to the author's lucid account of the beginning and development of the greatest experiment in all English and American legal history for bringing justice to the poor.

The experiment is now known as the legal aid movement, which found its early nurture, sound leadership, and driving power in the brain and spirit of one man who was president of The Legal Aid Society in New York for twenty-five years and to whom the book is dedicated in these graceful words: "To the memory of Arthur v. Briesen who loved his fellow men and being wise strove to give them justice." It is a tribute to the infinite possibilities of the human soul when one realizes that the obstacles which for centuries had seemed insurmountable finally yielded before the courage and vision of a single man who had an absolute passion for justice and who gladly devoted his life to her ministry.

Ever since Magna Carta the Anglo-American legal system has made sincere and repeated efforts to perform its promise of freedom and equality of justice. All these endeavors failed or were frustrated, in part because they were not soundly conceived and in part because the time was not yet ripe, but the ideal persisted and was recorded in our state constitutions and finally in the Fourteenth Amendment to the Constitution of the United States. By the last quarter of the nineteenth century the problem had become critical. In New York with its mass of foreign born, its inflowing tides of immigration, its poverty in large areas, greed, craft, and violence were mercilessly exploiting the ignorance and general helplessness of the humbler people.

It had become, in plain fact, impossible for thousands of persons to secure that protection and redress to which they were entitled, as of right, according to law. Mr. William D. Guthrie in his Foreword says, "The suffering, misery, and tragedy among the poor of the great American metropolis have been told with full sympathy and understanding and with much eloquence, *** a drift toward communism, revolution and anarchy would have been inevitable. In a word, failure of the legal aid movement might have spelled ultimate national disaster." This was an era of intense individualism and in the field of law the parable of the Good Samaritan was forgotten. Mr. Elihu Root has elsewhere written, "I think the true criticism which we should make upon our own conduct is that we have been so busy about our individual affairs that we have been slow to appreciate the changes of conditions which to so great an extent have put justice beyond the reach of the poor."

In 1876 a small group of public-spirited citizens of German birth or parentage incorporated a society *Der Deutsche Rechts-Schutz Verein* "to render legal aid to those of German birth who, from poverty, are unable to procure it." During its first year it served one thousand applicants for assistance. It struggled through many early vicissitudes, persons other than Germans came to it in steadily increasing numbers because it was their only legal haven, in 1890 Mr. Briesen became president and for the first time printed in English a report of the work. All previous reports had been in German so that naturally the society's activities remained entirely unknown to the general public. From 1892 to 1895 the society furnished counsel to 27,288 persons of whom more than half were not from Germany at all, being natives of thirty-two other countries including the United States. The organization's purpose clause had been changed in 1890 to read "to render legal aid to *all* who, from poverty, are unable to procure it." Finally in 1896, its corporate name, on petition to the Supreme Court, was changed to "The Legal Aid Society" and after this metamorphosis it stood forth in its true colors, with its object and meaning made so plain to the world that it served as a beacon light guiding other earnest persons, especially members of the bar, who saw the same distressing conditions in their own communities and were uncertain what to do. In 1898 Bishop Potter wrote, "I thank God that such a society exists in New York as a witness of the chivalry of the nineteenth century."

Beginning with the twentieth century this chivalry manifested itself in action. Legal aid societies and bureaus were organized in one city after another, extending from coast to coast. As Mr. Briesen put it, "The founders of the Legal Aid Society had no idea of the majestic proportions which their enterprise would assume. Like an avalanche it has gathered strength and increased in proportions as it advanced." He lived to see established nearly fifty different offices and since his death in 1920 the progress has continued until in 1927 there were in existence about seventy legal aid

organizations which together in that one year gave their assistance to over 160,000 persons.

Going back to the mainspring of this movement, to the Legal Aid Society in New York, it is interesting to recall how weak and poor it was itself for many years and how near it came to disaster. The officers were involved in a constant struggle to keep the wolf from the door. To add to its money troubles the Society found itself obliged to advance court costs for very poor clients with good cases. In the year 1882 its total expenses were $2,700 and in the same year it advanced nearly $500 in costs. The president said, "In the past year the Society brought suit in District Courts alone in 424 cases where the plaintiffs were unable to contribute to the expenses so that the Society is compelled either itself to advance the money or to turn away unaided the man entirely without funds." Obviously it took courage to live up to this idealism. From an early date small fees—a ten cent retainer and a ten per cent charge on collections—had been charged clients who could afford these amounts and an annual report says, "without this contribution the Society would long ago have had to discontinue its activity."

Today when we are familiar with the fact that legal aid is an essential part of the administration of justice it is easy to ask, where was the bar and why did it not help? But fifty years ago its importance was not understood. Not until 1916 did the organized bar, speaking through the Conference of Bar Delegates, set its approval on legal aid work. Since then progress has been rapid. In 1921 the American Bar Association created its standing Committee on Legal Aid Work. The Association of the Bar of the City of New York is now trustee of the Stillman Fund of $150,000, whose income it devotes to the Legal Aid Society, and today the lion's share of the Society's annual expenses, which amount to nearly $100,000, is contributed by members of the New York bar.

A few cases, selected from the many narrated by Professor Maguire, will make more vivid the scope, character, and import of the work. One afternoon preceding a Memorial Day holiday a mechanic came to the office and complained that a creditor had levied on his necessary working tools. By law these were exempt. The attorney explained that summary recovery could be had only through replevin which required a bond. The mechanic had no money for the purpose, at that time the Society had none, and its officers had left town. The attorney counselled patience but the man left the office visibly worried and upset, proceeded to Brooklyn Bridge, and there committed suicide by jumping into the East River.

Two boilermakers accepted a contract from the Quito Railway to work in Eucador. On arrival they found that the contract terms as to pay, hours, and living conditions were grossly violated. When they complained they were asked what they were going to do about it. What they did do was to work their way back via Panama to New York and there they reported to the Society. The Railway had offices in the city, could be reached by process, so that a day of reckoning followed and the boilermakers received their just damage.

When two boys aged nine and ten paid their ten cent retainer fee the Society settled down to a fourteen months' legal battle to secure from their uncle-guardian their inheritance from their father's estate. A new guardian was finally appointed who ultimately salvaged part of the fund, and the defaulting guardian was put into Ludlow Street Jail to ponder on the fiduciary relationship.

In 1914 a variation of the old lottery game was promoted in New York under the guise of a "club" furniture purchase plan. Some 13,000 persons had signed installment contracts aggregating $160,000. These could be voided, but as payments had been made the problem was to get something back. Counsel for the Society devised a comprehensive liquidation plan under which the sellers pleaded guilty and received suspended sentences in exchange for which they agreed not to go into bankruptcy and to pay off the contracts by deliveries of furniture to the best of their ability. At each of their stores a legal aid representative stood sentinel to see that the bargain was faithfully kept and after three months 11,500 of the claims had been completely adjusted.

An unusual situation arose on July 30, 1913, when the Society procured a writ of habeas corpus to prevent the deportation of a Greek boy who was about to be sent back on the *Olympic*. The attorney hurried to the pier to find the *Olympic* in midstream and headed for the ocean. Racing by taxi to the Battery he chartered the tug *Crescent,* reached the *Olympic* at quarantine, and returned with the boy.

In order to deal with the large area of metropolitan New York, the Society has established a number of branches of which the most picturesque is the Seamen's Branch. Here the seamen's rights have been so stoutly maintained that sailors agree that in no other port on the seven seas are they better protected. The older abuses of shanghaiing and crimping are virtually gone, due in no small part to the vigilant actions of the branch counsel who first succeeded in making these practices unsafe in daylight and then, when they were carried on at night, extended their own work into the night, boarding suspected ships at night, and using the launch *Sentinel* of the Episcopal Church Missionary Society for night patrol in the waters of the harbor. The early success of this Branch was largely due to the personal interest and support of Mr. J. Augustus Johnson whose "spirit hovered over all the men at sea, and on shore from the sea."

During the war the Society's resources were taxed to the limit in connection with the drafts, the allowance, allotment, insurance and civil rights acts, and in cooperation with the Red Cross. Much of this was routine but one case is of especial interest to lawyers. In August, 1918, a member of the A. E. F. stationed at Contres, France, made a nuncupative will by stating orally before two witnesses what disposition he wished made of his personal property. He was fatally wounded in action and died in March, 1919. One of the witnesses, a chaplain, had made a memorandum copy of which came to the Society. He was located in Oregon, he remembered and found the second witness, their depositions were taken, and the will was allowed. This was the first nuncupative will of a World War soldier admitted to probate in New York, and very likely it was the first in the entire country.

Criminal cases are now handled by a branch called the Voluntary Defenders' Committee. Restrained by lack of funds from engaging in criminal work extensively until 1917, the Society had constantly intervened in a small number of exceptional cases—one involving it in a brush with Anthony Comstock—and it had always been anxious to expand in this direction where its services were badly needed. At its annual meeting for 1909 the Chaplain of the Police Department ex-

claimed, "I am so dead in earnest about this matter that if you do not take it up I won't rest until I have taken it to some organization that will. There is a stigma on the legal profession as a result of the state of things which obtains in our criminal courts which it is for the profession to remove."

In 1917, under the leadership of Mr. James Bronson Reynolds the Defenders' Committee was financed and launched. It persuaded the Assistant District Attorney to resign his post and become its first counsel thus assuring high-grade, experienced service to clients from the outset. Its cases come mainly by court assignment. The 1927 report says, "In the Court of General Sessions of the County of New York approximately 1500 defendants each year are without means to retain counsel. Of these the Legal Aid Society acted for 558."

The work of the Criminal Branch has been so thoroughly well done that Professor Maguire terms it "the flower and crown of New York legal aid achievement." Certainly the District Attorney himself is a most competent witness and in 1926 he publicly stated, "If you could come to the criminal courts, if you could know what I know, could feel what I have felt, could see what I have seen, the coffers of New York could not hold the money that would pour into the Legal Aid Society to strengthen its operation in the Criminal Courts Building."

These words were spoken at the Society's fiftieth anniversary dinner. On its twenty-fifth anniversary birthday, Vice-President Roosevelt, speaking less than six months before President McKinley's assassination by an anarchist, and almost as though he had a premonition, pronounced the fundamental importance of legal aid work to the whole community in these words: "The men who are fighting the battle against violent revolution in the existing social order are the men who are doing their best to abate the injustices of the existing social order. A failure to recognize these injustices, a failure to exert every effort to abate them, is in many cases equivalent to aiding the effort to overthrow by violence the good and evil alike."

This is the great service of legal aid work. It is the reason for its existence and the reason it is destined to make a vital contribution to our national well-being. Mr. Briesen has summed up this purpose and this philosophy in these beautiful words which have the sincerity and ardor of a creed, "We are satisfied that we help preserve within a large city, which is peopled by incongruous elements drawn from all the nooks and corners of the universe, a moral equilibrium. We teach those who try to wrong others that they can no longer do so with impunity, and, therefore, better them. We teach those who have been wronged against, that their suffering is our matter, and that the injustice done them must be undone, and we undo it, thereby turning dissatisfaction into delight and happiness."

Boston REGINALD HEBER SMITH.

Leading Articles in Current Legal Periodicals

Illinois Law Review, February (Chicago)—Labor Injunctions in Illinois, by Robert Kingsley; Legal Status of the Comptroller General of the United States, by Albert Langeluttig.

American Journal of International Law, January (Washington, D. C.)—The Seventh Year of the Permanent Court of International Justice, by Manley O. Hudson; The Doctrine of Positive Acts, by Guy Stevens; The Doctrine Res Judicata in Naturalization Cases in the United States, by Henry B. Hazard; The Origin of the Law of Unneutral Service, by Norman L. Hill; Reservation Clauses in Agreements for Obligatory Arbitration, by Robert R. Wilson; The Interpretation of Multilateral Treaties, by Quincy Wright.

Canadian Bar Review, January (Toronto)—The Struggle for Law, by Henry Upson Sims; Encroachments on the Statute of Frauds, by F. P. Betts; The Revolt of the Silk Merchants, by John D. Falconbridge; The Bicentenary of Burke, by Charles Morse.

Michigan Law Review, February (Ann Arbor, Mich.)—Forestalling, Regrating and Engrossing, by Wendell Herbruck; Conflict of Laws; Recent Development Concerning Marriage, by Francis Deak; The Scope of Judicial Review, by Edson R. Sunderland.

Minnesota Law Review, January (Minneapolis, Minn.)—After-acquired Property Under Conflicting Corporate Mortgage Indentures, by Henry E. Foley and L. Welch Pogue; Business Enterprise and the Public Utility's Duty to Serve Without Discrimination, by Gustavus H. Robinson; Hobbled Justice—A Talk with Judges, by Thomas W. Shelton.

Columbia Law Review, December (New York City)—Mutuality of Obligation in Bilateral Contracts at Law, by Herman Oliphant; The Duty Problem in Negligence Cases, by Leon Green; Theory of Anglo-American Dividend Law: The English Cases, by Joseph L. Weiner.

Harvard Law Review, December (Cambridge, Mass.)—The "Higher Law" Background of American Constitutional Law, by Edward S. Corwin; The Preemptive Right of Shareholders, by Victor Morawetz; Liability of the Trustee under the Corporate Indenture, by Louis S. Posner.

Wisconsin Law Review, December (Madison, Wis.)—Monopoly and Restraint of Trade under the Sherman Act, by Herbert H. Naujoks.

Illinois Law Review, January (Chicago)—Jurisdiction in Personal Actions, by E. Merrick Dodd, Jr.; Inheritance Taxation on Powers of Appointment, by Richard Bentley; History of Human Sterilization in the United States, by J. H. Landman.

West Virginia Law Quarterly, December (Morgantown, W. Va.)—Common Law Declaration in West Virginia, by Leo Carlin; Right of the Accused in a Criminal Case not to be Compelled to be a Witness Against Himself, by Mose E. Boiarsky; Fictional Lost Grant in Prescription—A Nocuous Archaism, by J. W. Simonton.

Yale Law Journal, January (New Haven, Conn.)—Some Observations on the Law of Evidence,—State of Mind to Prove an Act, by Robert M. Hutchins and Donald Slesinger; Res Judicata, by Robert von Moschzisker; The Domicil of a Corporation, by Joseph F. Francis.

Harvard Law Journal, January (Cambridge, Mass.)—Predictability in the Administration of Criminal Justice, by Sheldon Glueck and Eleanor T. Glueck (with foreword by Roscoe Pound); Husband and Wife as Statutory Heirs, by Paul L. Sayre; The "Higher Law" Background of American Constitutional Law II, by Edward S. Corwin.

Nebraska Law Bulletin, November (Lincoln, Neb.)—The Intent to Pass Title in Sales of Goods (Part II), by L. Vold; The Lawyer and Reforms in Practice, by Rollo F. Hunt; The Urban Real Estate Boom in Nebraska During the Eighties (Part II), by Herbert L. Glynn.

Virginia Law Review, January (Charlottesville, Va.)—The Arlington Case, by Enoch Aquila Chase; What Cannot be Sold Cannot be Mortgaged, by Blewett Lee; Arbitration of Commercial Disputes, by Charles Newton Hulvey.

University of Cincinnati Law Review, January (Cincinnati)—Simplification of Appellate Procedure, by Edson R. Sunderland; Declaratory Judgments, by Edwin M. Borchard; Exemption from Taxation of Property Used for Religious, Educational and Charitable Purposes in Ohio, by Elmer R. Heisel.

New York University Law Review, January (New York City)—The Hilary Rules and Their Effect on Negative and

(Continued on page 248)

NEW YORK ANNOTATIONS TO RESTATEMENT OF CONTRACTS

A HIGHLY important addition to the growing number of local annotations to the American Law Institute's Restatements of the common law has just appeared: the New York Annotations to the Restatement of the Law of Contracts, so far as completed (Sections 1-77).

This first portion of the Restatement, prepared by Professor Samuel Williston of Harvard Law School, advised and assisted by Professor Arthur L. Corbin of Yale, Professor Dudley O. McGovney of California, Professor Herman Oliphant of Columbia, Professor William H. Page of Wisconsin, and Professor William E. McCurdy of Harvard, was approved by the American Law Institute last April, and was published in September. Further portions of the Restatement of Contracts will be published by the Institute from time to time.

The New York Annotations to the Restatement represent the joint efforts of the faculty of Cornell University and the New York State Bar Association. The annotations were prepared by Professor Horace E. Whiteside of the Cornell Law Faculty, under the direction of a special committee of the Faculty, consisting of Dean Charles K. Burdick, Professor Robert S. Stevens and Professor George J. Thompson. The cost of preparing the material for the press was defrayed by Cornell University from the Ward Fund, and the cost of publication was borne jointly by the University from the same fund and by the New York State Bar Association. The work was published as a supplement to the Cornell Law Quarterly for February, 1929.

The New York Annotations reprint the entire text of the Restatement in the original form, stating the rule of each section in large bold face type, followed by the *Comments* of the official draft, amplifying and explaining the rule stated. Under this, in smaller type, has been inserted the *Annotation* to each section, illustrating the principle stated in the section by references to the significant New York decisions and statutes, and indicating wherein the Restatement is in accord with or departs from the New York law.

The style followed can best be illustrated by quoting a typical section:

Section 108. PROMISOR AND PROMISEE MUST BE NAMED OR DESCRIBED IN THE WRITING.

A promise under seal is not operative as a contract under seal unless both the promisor and the promisee are named or so described therein as to be capable of identification when the writing is delivered.

Comment:

a. It is a requirement of a sealed contract that all facts essential to a determination of all the terms of the contract appear in the document. Attempts to make a contract under seal, which are ineffectual as such for failure to observe this principle, may, however, create an informal contract, if the requirements of such a contract exist.

Annotation:

This section is in accord with the law of New York. An undisclosed principal cannot be charged on the sealed obligation signed in the name of his agent. Briggs vs. Partridge, 64 N. Y. 357, 21 Am. Rep. 17 (1876); Crowley vs. Lewis, 239, N. Y. 264, 146 N. E. 374 (1925). For the conflict on this point in other jurisdictions, see the following notes: 23 Col. L. Rev. 663; 25 Id. 678; 7 Cornell L. Quart. 143; 23 Mich. L. Rev. 67; 72 Univ. of Pa. L. Rev. 74; 34 Yale L. J. 782. But an undisclosed principal may be sued upon the simple written acceptance of an option under seal. O'Grady vs. Howe & Rogers Co., 166 App. Div. 552, 152 N. Y. S. 79 (1915). An undisclosed principal cannot maintain an action as plaintiff upon a sealed writing. Williams vs. Magee, 76 App. Div. 512, 78 N. Y. S. 550 (1902), aff'd 177 N. Y. 534, 69 N. E. 1133. See also Case vs. Case, 203 N. Y. 263, 96 N. E. 440 (1911).

A third party beneficiary, though not named in the writing, can sue on the contract under seal. Pond vs. New Rochelle Water Co., 183 N. Y. 330, 76 N. E. 211 (1906). Though no New York case has been found, it is apparent that a sealed contract cannot be executed with a corporation not yet formed. Hudson Co. vs. Tarver, 156 Mass. 82, 30 N. E. 465 (1892). Nor can a floating sealed promise be executed in such a manner that the beneficiary is not determined until a later time. Saunders vs. Saunders, 154 Mass. 337, 28 N. E. 270 (1891).

In connection with the comment, see the last paragraph of the annotation to § 97, supra.

An interesting fact to be observed in the New York Annotations is the close accord between the principles laid down in the Restatement and the established law of New York. Of the 177 sections, more than a hundred are definitely in accord with the law of New York, and fifty more are "not inconsistent" (as where the New York cases have reached decisions consistent with the rule stated, but either on different reasoning, or without attempting to lay down any general rule). Of the remaining sections, seven state propositions on which there are no New York cases. Here the presumption should be that the New York law is in accord with the Restatement, for as Professor Goodrich has said, "With no binding authority against it, a proposition of law thoroughly considered and clearly stated by competent legal scholars should be accepted as correct without serious question." Five sections, and a few subsections, are covered by New York statutes (the Negotiable Instruments Law, the Debtor and Creditor Law, etc.). The writer has been able to find only four sections, and subdivisions of four others, out of the total 177, which either are or seem to be at variance with the law of New York.

One of the few sections definitely at variance with the law of New York states that a sealed instrument need not recite the fact of sealing or of delivery.

Section 100. RECITAL OF SEALING OR DELIVERY IS UNNECESSARY.

A recital of the sealing or of the delivery of a written promise is not essential to its validity as a sealed contract.

Comment:

a. A recital may be of importance to show that a dash or scroll after a signature is a seal (see Section 96); but the recital is not an independent requirement, so that if a wafer or other object attached to a written promise is evidently a seal, a sealed contract is formed though there is no recital.

Annotation:

This section is at variance with the New York decisions. Weeks vs. Esler, 143 N. Y. 374, 38 N. E. 377 (1894); Matter of Pirie, 198 N. Y. 209, 91 N. E. 587 (1910). In the case last cited the court said (p. 214): "There is noth-

ing in the body of the note or of the signing of it which indicates that it was intended to be a sealed instrument. Ordinarily a seal affixed to a paper in the form of a promissory note changes it into a sealed instrument, which, under the Statute of Limitations, may run for twenty years; but the mere attaching of a seal after the signature does not raise a presumption that the note is a sealed instrument, unless there be a recognition of the seal in the body of the instrument, by some such phrase as 'witness my hand and seal' or 'signed and sealed.'" Cf., however, Atlantic Dock Co. vs. Leavitt, 54 N. Y. 35, 40 (1873); and Brooklyn Public Library vs. City of New York, 222 App. Div. 422, 434, 226 N. Y. S. 491 (1928), *semble contra*. See also Wil. Contr., § 209.

A recital without a seal is insufficient to make a sealed instrument. Empire Trust Co. vs. Heinze, 242 N. Y. 475, 152 N. E. 266 (1926).

The New York requirement that the fact of sealing be stated in the body of the instrument may possibly be explained by the fact that in New York, a scroll following the name is sufficient to constitute a seal. Where a narrower common law definition of a seal is adhered to, recital of the fact of sealing is nowhere required.

Propositions stated in the Restatement on which there are no New York cases are annotated with references to whatever analagous decisions have been rendered:

Section 50. TERMINATION OF OFFER BY ILLEGALITY.

Where after the making of an offer and before acceptance the proposed contract becomes illegal the offer is terminated.

Annotation:

There is no direct authority in New York in support of this section. A contract is, however, discharged by subsequent illegality. Panto vs. Kentucky Distilleries, 215 App. Div. 511, 214 N. Y. S. 19 (1926); People vs. Globe Ins. Co., 91 N. Y. 174 (1883).

The truly remarkable consistency between the principles stated in the Restatement and the New York cases is in accord with the experience in other states. Professor Goodrich, discussing the project of preparing and publishing local annotations to the Restatements in the JOURNAL of last October, cited comparisons that had been made between portions of other Restatements and local decisions of various states, all showing the closest consistency between the two. Thus, Professor Goodrich reported, in the West Virginia and Virginia cases on the law of domicile, the subject of the first part of the Conflict of Laws Restatement, the only variance between decisions and Restatement was in regard to the power of a widowed mother to change the domicile of her minor children after her remarriage. An early West Virginia case had denied such power; the Restatement, following what seemed the more modern view, admitted it. So, too, in the Michigan annotations to the Conflict of Laws Restatement, only one square inconsistency was found, and that was upon a point on which the Michigan cases were in the extreme minority.

This consistency between the Restatement and the local law demonstrates that while conflicting decisions can be found on almost any proposition of law, yet in any one state, the decisions will be found to be contra to the weight of authority on only relatively few points. The great purpose of the Restatements is to persuade courts to reconsider these peculiar local rules, wherever possible, in the interest of unity and certainty in our law.

That the Annotations will greatly enhance the value of the Contracts Restatement to the New York lawyer is clear. The Restatement cites no authorities to support the principles it lays down. As the consensus of opinion of American legal scholarship, its power of persuasion with the court will be great; nevertheless, a lawyer obviously cannot rely upon the Restatement solely, and disregard the decisions of the highest court of his state. The local annotations give him not only the general principle, but also tell him to what extent that principle is supported by the cases in his state. A detailed table of contents is part of the official Restatement. The New York Annotation has also added an exhaustive index, covering the material in the annotations as well as the sections of the Restatement. This makes it a simple matter to find the general principle and the local law applicable to any particular case.

The Annotations also bring to the lawyer important points which cannot be included in a general restatement of the law—local statutory modifications, for example. The Restatements sometimes call attention to statutes, where they are of a type generally found in our states (e. g. uniform laws). But the local annotations should call attention to *all* relevant statutes, and show their effect upon the general common law rule given in the Restatement. How well the New York Annotations accomplish this function is shown in the following section, which states a rule covered by a New York statute:

Section 125. SURVIVORSHIP OF JOINT DUTIES.

On the death of a joint promisor in a contract when one or more of the joint promisors are still surviving, the estate of the deceased promisor is not bound by the joint promise unless all of the surviving joint promisors are insolvent; nor in that event if the deceased promisor was a surety.

Annotation:

This section restates substantially the New York law as it existed prior to the adoption of Debtor and Cred. L., § 236, which provides: "On the death of a joint obligor in contract, his estate shall be bound as such jointly and severally with the surviving obligor or obligors." (Inserted by L. 1928, ch. 833, § 1. In effect April 5, 1928.) This would seem to bind the estate of the deceased joint obligors, whether or not the survivors are insolvent, and whether or not the deceased was a surety. Debtor & Cred. L., § 236 does not repeal or alter the provisions of the C. P. A. or Part. L. (Debtor & Cred. L., § 240).

Under the former New York law, upon the death of a joint obligor, his estate was discharged at law. Risley vs. Brown, 67 N. Y. 160 (1876), death pending appeal. But in equity the estate of the joint obligors could be charged upon proof of the insolvency of all the survivors, or upon proof that the creditor had sued them to judgment and execution unsatisfied. Pope vs. Cole, 55 N. Y. 124 (1873); Barnes vs. Brown, 130 N. Y. 372, 29 N. E. 760 (1892). C. P. A., § 85 (formerly C. C. P., § 875) provides in part: "The estate of a person or party jointly liable upon contract with others, however, shall not be discharged by his death, and the court may make an order to bring in the proper representative of the decedent when it is necessary so to do for the proper disposition of the matter." But in Potts vs. Dounce, 173 N. Y. 335, 66 N. E. 4 (1903), it was held that this section gave the creditor a remedy at law in those cases only, in which he formerly had a remedy in equity, i. e., upon proof of the insolvency of the survivors or return unsatisfied of execution against them. The same rule was applied to a partnership. Seligman vs. Friedlander, 199 N. Y. 373, 92 N. E. 1047 (1910), but cf. Part. L., § 67 (4), under which the result of Debtor and Cred. L., § 236, may be reached. Moreover, "It is a rule of the common law, too long settled to be disturbed, that if a joint obligor dying be a surety, not liable for the debt irrespective of the joint obligation, his estate is absolutely discharged, both at law and in equity, the survivor only being liable." Davis vs. Van Buren, 72 N. Y. 587, 589 (1878). *Accord:* Getty vs. Binsse, 49 N. Y. 385 (1872); Randall vs. Sackett, 77 N. Y. 480 (1879). The death of one joint surety does not

relieve his estate from the obligation to contribute. Johnson vs. Harvey, 84 N. Y. 363 (1881).

The vast multiplicity of decisions which our law has accumulated has tended to blur our perception of underlying principles. We cannot see the general, because of the maze of particulars. As Judge Cardozo has said in his volume on "The Growth of the Law," "We have a filigree of threads and cross-threads, radiating from the center, and dividing one another into sections and cross-sections. We shall be caught in the tentacles of the web, unless some superintending mind imparts the secret of the structure, lifting us to a height where the unity of the circle will be visible as it lies below."

The American Law Institute is the superintending mind which has shown us the unity of the circle. Local annotations, like those prepared by Professor Whiteside for the Restatement of the Law of Contracts for the State of New York, impart the secret of the labyrinth of decisions, fitting each into its proper place in the pattern.

CONFLICT OF TWO IDEALS OF SOCIAL JUSTICE

The "No Man's Land" of Industrial Accident Liability in Interstate Commerce—Recedent Jurisdiction of the States—Typical Cases in Which Injured Interstate Workmen Were Without Remedy—Rules Now Socially and Economically Obsolescent—Suggested Remedies

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Scope and Purpose

In Preface to Bulletin No. 398, U. S. Bureau of Labor Statistics (1926) entitled, "Growth of Legal Aid Work in the United States," Honorable Wm. H. Taft, Chief Justice of the United States Supreme Court, said:

> "A great deal has been done to promote the achieving of justice for the poor and unfortunate in Workmen's compensation acts; they have expedited just recoveries and have relieved the burdened courts enabling them to dispose of other litigation heretofore long delayed."

Keeping that thought in mind, the liberty is taken of employing the above caption under which to bring to the reader's notice the results of an exploration in the twilight zone indefinitely allocated between the jurisdiction of the states and the national jurisdiction, in which it was sought: first, to delimit authority between two sovereigns in the right to exercise certain police powers in the regulation of commerce and industry; second, to suggest changes in the law to the betterment of railroad employes in interstate commerce who sustain injuries and consequent loss of earning power in the course of such employment; and, third, possible extensions of legal measures to indemnify injured employes in the rapidly developing business of interstate motor and air service, of a like character to that made effective as to railroads.

No Man's Land

It is of national significance on the general subject of industrial accident law to know that in the field of interstate commerce there exists between the national and state jurisdictions a definite zone which may be designed "No Man's Land," described like this: if an employe of an interstate railroad common carrier is engaged in interstate commerce business at the time an injury befalls him in the course of such employment, and if no negligence be proven against the carrier nor any positive violation of the Federal Safety Appliance Act shown as the proximate cause of the injury, neither the workman, nor his dependents, in case of his death resulting therefrom, may recover any damages under the Federal Employer's Liability Act, nor any indemnity under the Workmen's Compensation Laws of any State.

The Recedent Jurisdiction of the States as shown by Supersession of Workmen's Compensation Acts in Interstate Railroad Industrial Casualties by the Federal Employers' Liability Act

The legal situation is that the Federal Employers' Liability Act having ousted the states of jurisdiction under their Workmen's Compensation Acts over all interstate railroad common carriers, their employes engaged in interstate commerce who sustain injuries not attributable to actual or constructive negligence of the carrier, must go hence without day and they and their dependents are left by the present laws to bear the entire burden of the employes' loss of earning power. Further, in case of an injury where the proximate cause is chargeable to the interstate carrier's negligence, the employe must resort to a damage suit under the Federal Employers' Liability Act of the type which the Workmen's Compensation Acts of forty-three states have thrown out the back door.[1] Under these Acts, except for injuries occurring in the course of interstate business, compensation may be expeditiously recovered for injuries sustained in the course of an employe's work where the results have disabled him. Some of the state statutes provide that the injury sustained must be the result of an accident arising out of and in the course of the employment, while others leave out the word "accident" and allow recovery for injuries sustained that were not the result of what is legally defined an accident, such as exposure to ex-

1. Federal employes' liability act, Mason's Code (1926 Ed.) Vol. 3, Title 45.—Railroads, Chapter 2, Section 51 to 59 incl.

cessive heat or cold, though occupational diseases are eliminated.

Any injury to a workman in the course of his employment in interstate commerce, occasioned by the carrier's negligence, brings his case under exclusive control of the Federal Employers' Liability Act. But how determine the commerce? The rule is easily stated, but there is a wilderness of cases in which both state and United States courts have expended untold labor and made exhaustive research in applying it. State decisions have gone as far as possible to retain their jurisdiction under the Workmen's Compensation Acts, and on the other hand, the United States courts have consistently maintained the federal supreme authority in full vigor and to its logical limits in harmony with the constitutional principle of federal supremacy. The United States Supreme Court in applying the commerce test, said:[2]

"Each case must be decided in the light of the particular facts with a view of determining whether, at the time of the injuiry, the employe is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof."

The subject matter presents a field of litigation most thoroughly and ably canvassed in a labyrinth of precedents. But not overlooking in this maze the injured workman and his dependents, may it not be truthfully stated that in their interests the protracted litigation over injuries in interstate business should be reduced to a minimum, so that between the disabling industrial accident and the payment of money to tide over the loss of earning power the big bulk of this costly litigation may be dispensed with, the negligence doctrine discarded and under new, practical, simplified machinery, based on compensation for loss of earning power, relief afforded with greater promptness and yet by due process of law?

Typical Cases in Which Injured Interstate Workmen Were Without Remedy Under the Federal Employers' Liability Act Nor Was Recovery Possible Under Any State Workmen's Compensation Act

Let us illustrate with adjudicated cases necessarily allocated under present law in No Man's Land.

Case No. 1. Timothy Carey[3] was a freight train conductor working for the Grand Trunk Western Railroad Company in a movement of an interstate train out of Chicago to points into and beyond Michigan. It was claimed he sustained an injury by tripping and falling over a semaphore wire strung along the railroad track at the Lansing Station, from the developing consequences of which he died. The railroad company employer as to its intrastate business had filed with the Michigan Department of Labor and Industry its acceptance of the Michigan Workmen's Compensation Act. After the conductor's death his dependent widow presented a claim against the company and sought adjudication according to the terms of the Michigan Workmen's Compensation Act. The company declined in writing to settle the claim as presented upon the ground that the conductor at the time of the accident was engaged in interstate commerce. The Industrial Accident Board of Michigan, after a hearing, ordered the claim allowed under the provisions of the Michigan Act. The company appealed to the Supreme Court of Michigan which reversed that order and dismissed the widow's case, holding:

"The decision of the Supreme Court of the United States that the entire subject of the liability of interstate railway carriers for the death or injury of their employees while employed in interstate commerce is completely covered by the Federal Employers' Liability Act is controlling in Michigan, rendering inapplicable the provisions of the Michigan workmen's compensation act in such cases.[4]

"Where claimant's husband, a conductor, was accidentally killed while in charge of a freight train composed exclusively of cars containing interstate shipments, an award of compensation under the Michigan workmen's compensation law was unauthorized, the Federal employers' liability act[5] having exclusive jurisdiction, notwithstanding defendant railroad company had filed its acceptance of the Michigan act, since it would apply to cases arising in intrastate commerce only; defendant being engaged in both interstate and intrastate commerce.

Case No. 2. John Doe,[6] (true name not in report) was a builder and repairer of trucks for locomotives employed in the railroad company's roundhouse at Roseville, California, and at the time of his death was engaged in repairing a switch engine in the roundhouse. The switch engine had been used in handling both interstate and intrastate commerce, about seventy per cent of which work was interstate. At the time of the accident the railroad company had temporarily withdrawn the engine from active service for repairs in the roundhouse, to be returned to such service when repaired. The injury sustained by the workman caused his death. His dependents applied for workmen's compensation under the California Act. The Industrial Accident Commission of that state awarded it to them. The case was appealed to the Supreme Court of California and it annulled the award, holding that at the immediate time of the injury sustained by the deceased he was engaged in interstate commerce and that his case, if any, should be brought under the Federal Employers' Liability Act. Nothing appeared in the reported statement of facts in the opinion showing any negligence on the part of the employer, hence, no recovery was likely and we see the workman caught in the bridgeless gap.[7]

Case No. 3. Hilbert Allen[8] was a car checker for an interstate common carrier, the Receiver of the Toledo, St. Louis and Western Railroad Company. He was injured while engaged in work in its railroad yards at Madison, Ill., when struck by a shunted car. He sued for damages under the Federal Employers' Liability Act in the circuit court of St. Louis, Missouri, and recovered judgment, which the Supreme Court of Missouri affirmed. The negligence claimed against the interstate carrier was its failure to maintain adequate space between the tracks in the yard and failure of other employes to warn him of the approach of the shunted car. After his case had passed through the circuit and Supreme Courts of Missouri with the jury and court decisions in his favor, the carrier appealed to the United States Supreme Court. There the judgment was reversed and upon review of the evidence, it found as a matter of law upon common law principles, no negligence shown, and denied the injured employe any recovery under the Federal Employers' Liability Act. It likewise was a sequence that as he was injured in interstate commerce work,

2. N. Y. C., etc., R. Co., v. Carr, 238 U. S. 260, 263-4.
3. Carey v. Grand Trunk Western R. Co., 200 Mich. 12, decided Feb. 19, 1919.
4. New York Central R. Co. v. Winfield, 244 U. S. 147.
5. 35 U. S. Stat. 65.
6. Southern Pac. Co. v. Pillsbury, 170 Cal. 782, decided Aug. 7, 1915.
7. Compare with Industrial Acc. Com. of Cal. v. Davis, 259 U. S. 182.
8. Toledo, St. L. and W. R. Co., v. Allen, 48 S. C. R. 215. Decided Feb. 20, 1928.

he could not recover compensation under the Workmen's Compensation Law of Illinois, the state in which he was injured, because of the supremacy of the Federal Employers' Liability Act over all Workmen's compensation laws.[9]

This case showed an industrial accident which, had it occurred while the carrier and employee were engaged in intrastate commerce, would have been governed by the Illinois Workmen's Compensation Act, and a prompt, sure recovery of indemnity to supply the loss of earning power during disability would have been had under the law.[10]

There is, of course, no doubt that an injured employe in interstate commerce is afforded a remedy in an action for civil damages under the Federal Act where employer can be shown to have been negligent; but between the time of the injury and the workman being paid any money for relief of loss of earning power there necessarily intervenes a long delay, financial distress to the employe and his family, protracted litigation, if undertaken, court costs, high contingent fees to lawyers and successive appeals, with all the evils which attend negligence litigation of the old school of thought.

Case No. 4. George W. Smith[11] was a watchman employed in the railroad yards of the Southern Pacific Company at Colton, California. On the night of Jan. 13, 1914, a through passenger train running from New Orleans to San Francisco and carrying passengers, baggage and express from points without the state destined for points within California, came into the yards. Acting within the line of his duty, Smith boarded the tender of the locomotive attached to the train, as it got under way again, for the purpose of preventing trespassers from getting on the cars. As the train moved out three men attempted to board the "blind baggage," that being the car nearest the engine and having no door leading from the platform to the interior of the train. Mr. Smith shouted at the men, they jumped from the platform and Smith left the engine tender alighting on the ground. He started to pursue the three men in order to drive them from the company's property, and while doing so his revolver fell from its holster and a cartridge therein exploded, the bullet striking Smith's left thigh, inflicting a flesh wound.

He sustained disability and loss of earning power from this injury and asked for compensation under the Workmen's Compensation Act of California. No doubt the Industrial Accident Commission of California rightly held as a strict legal proposition that he could not recover Workmen's Compensation under the California Act because he was injured in the line of his duty in performing an act in furtherance of interstate commerce—namely, police work on the railroad company's grounds, in the protection of an interstate passenger train, and that the accident happened while he was ejecting trespassers therefrom. Nothing appeared in the statement of facts showing the employe had grounds to recover damages under the Federal Employers' Liability Act because it was a non-negligent injury. Thus, again, because of its absence, there was no chance of recovery under the Federal Employers' Liability Act, and on the other hand, because the workman was engaged in interstate commerce, there was no chance of recovering compensation under the Workmen's Compensation Act of California.

In its opinion concerning the absence of any right of its employee to recover either damages or compensation under the Federal Employers' Liability Act or under the Workmen's Compensation Act of California, the Court said:

"The United States Congress is given power by the Constitution to regulate commerce among the several states. As to the application of local or state statutes made in the exercise of the police power affecting instrumentalities of interstate commerce, it is said that this subject belongs to the reserve power of the states; that is, the power may be exercised by the states in the absence of legislation covering the same subject by Congress. When the power of Congress, however, is exercised in the direction of covering the matter sought to be so regulated, and is comprehensive to that end, then the state regulation must give way before the superior law."[12]

Master and Servant Common Law Negligence Rules Applied to Industrial Accidents Now Socially and Economically Obsolescent

The humane aspect of the law reflected in these types of cases to the minds of men and women doing the country's industrial labor in interstate commerce is unfavorable; it also shows it to be economically obsolescent. While workmen's compensation laws of forty-three states afford adequate, speedy remedies to supply the loss of earning power during recovery from intrastate and non-commercial industrial injuries, the laws of the United States afford no such adequate, prompt relief to disabled interstate commerce employes.

The Federal Employers' Liability Act, while it modifies to some extent common law negligence rules between master and servant, still falls short of doing social justice to injured interstate commerce workmen. It simply keeps pace with the intellectual goose step of personal injury railroad negligence litigation upon common law principles, which every lawyer knows is the last word in uncertainty, high cost of justice, and, as it has been shown by typical cases given, casts out empty handed the industrially injured employe in instances where such results should not, from the standpoint of social justice, be the vogue.

In a statement written by Justice Winslow of the Supreme Court of Wisconsin, the situation has been given its classic exposition:

"In the days of manual labor, the small shop with few employees, and the stage coach there was no such prob-

9. In the opinion (8) the United States Supreme Court said: "The act of Congress under which plaintiff seeks recovery took possession of the field of liability of carriers by railway for injuries sustained by their employees while engaged in interstate commerce, and superseded state laws upon that subject. Second Employers' Liability cases, 223 U. S. 1, 55. This case is governed by that act and the principles of the common law as applied in the courts of the United States. The plaintiff cannot recover in the absence of negligence on the part of defendant. Seaboard Air Line v. Horton, 233 U. S. 492, 502. And except as specified in section 4 of the act (45USCA, Sec. 54; Comp. St. Sec. 8660), the employee assumes the ordinary risk of his employment, and when obvious or fully known and appreciated by him, the extraordinary risk and those due to negligence of his employer and fellow employees. Boldt v. Pennsylvania R. R. Co. 245 U. S. 441, 445. Chesp. & Ohio Ry. v. Nixon, 271 U. S. 218. If upon an examination of the record, it is found that as a matter of law the evidence is not sufficient to sustain the essential findings of fact, the judgment will be reversed. C. M. & St. P. Ry. Co. v. Coogan, 271 U. S. 272, 274."

10. Of like character was Missouri Pac. R. Co. v. Aeby, 48 S. C. R. 177, decided Jan. 3, 1928, where action under Federal Employer's liability act failed because no negligence yet where recovery of compensation under a Workmen's compensation act would have been amply justified had federal remedial act so permitted.

11. Smith v. Industrial Acc. Com. of Calif. 26 Cal. App. R. 560, decided Feb. 16, 1915.

12. See Mondou v. New York, New Haven & Hartford R. R. Co., 223 U. S. 1. McCulloch v. Maryland, 4 Wheat. 316. Seaboard Air Line R. Co. v. Horton, 233 U. S. 501. Taylor v. Taylor, 232 U. S. 368. Michigan Central R. R. Co. v. Vreeland, 227 U. S. 59.

In point as to the exclusive nature of similar acts of Congress are the cases of Chicago R. I. & P. R. Co. v. Hardwick Farmers' Elev. Co., 226 U. S. 426. Chicago B. & Q. R. Co. v. Miller, 226 U. S. 513. Simpson v. Shepard, 230 U. S. 253. Erie R. Co v. New York, 233 U. S. 671.

Opinion of Knappen, C. J. Grand Trunk Ry. Co. v. Knapp, 223 Fed. at pp. 954-5, contains a discussion and citations pro and con on liability for nonnegligent injuries in interstate commerce under State workmen's compensation acts.

lem, or, if there was, it was almost negligible. There was no army of injured and dying, with constantly swelling ranks marching with halting step and dimming eyes to the great hereafter. This is what we have with us now, thanks to the wonderful material progress of our age, and this is what we shall have with us for many a day to come. Legislate as we may in the line of stringent requirements for safety devices or the abolition of employer's common law defenses, the army of the injured will still increase, and the price of our manufacturing greatness will still have to be paid in human blood and tears. To speak of the common law personal injury action as a remedy for this problem is to jest with serious subjects, to give a stone to one who asks for bread."

The expressions of many able courts giving full attention to social economic aspects of the injured wage earners' serious problems further emphasize the point. The rationale of the demand for workmen's compensation acts, the evils of personal injury litigation and the harshness of the common law rules, where negligence and the freedom from contributory negligence must be shown, or the doctrine of comparative negligence battled with and contention had over the measure of damages for injuries in industrial accidents, have been most forceably presented and their existence fully justified as the better system for industry to be governed by.[13]

Suggested Remedies

It definitely appears that unless a legislative remedy is available through action of Congress, No Man's Land will continue to be the final repository of injury and disability causes of the types given, and the classic exposition of Justice Winslow will remain a true picture of the backward state of the federal law in its denial of social justice to the interstate commerce wage earner.

Devising an adequate, appropriate remedy is the difficult, yet the real business aspect of the subject. The legal machinery should be created.

"It is the machinery of justice that gives life to the law. It is the administration of justice that makes the laws actively effective. It results that if the laws are to afford their equal protection to all persons in a modern community the machinery of justice must be readily accessible to all, must be easily workable by all, and must be swift in its operation.

"Our present difficulty arises because we have not yet refitted our whole system to meet the new demands of our urban populations. Entirely too many citizens find in actual experience that access to the courts is difficult, that the procedural machinery is complicated beyond any hope of their understanding and utilizing it, and that the legal system moves so slowly in their behalf that no prompt and summary relief can be obtained. . . .

"The superiority of the law affording compensation for accidents over the prior law which required a suit for damages based on the employer's negligence is so great and is so universally admitted that no extended comment on this aspect of the matter is necessary. But if the legislation which introduced the compensation principle had stopped there very little gain would have resulted, and in fact the legislatures went much further. They attacked the defects in the machinery of justice which we have summarized under the three headings of delays, court costs and fees, and the necessary expense involved in the employment of counsel. The legislatures practically abolished all costs and fees, they designed a procedure that would be summary in character, they wished to eliminate the necessity for counsel altogether, and accordingly they intrusted the administration of the workmen's compensation acts not to the courts but to a new type of quasi-judicial agency called industrial accident boards or commissions."[14]

Three alternative remedies are suggested for consideration:

(1) A compulsory National Workmen's Compensation Act covering all employers and employes engaged in interstate commerce by rail and possibly also motor and air, made to supersede the Federal Employer's Liability Act; or

(2) An optional National Workmen's Compensation Act supplemental to the present Federal Employers' Liability Act, covering all the same class of employes and employers who accept its provisions; or

(3) A proviso to the present Federal Employers' Liability Act saving and reserving to interstate commerce workmen the right to prosecute claims for compensation for injuries in interstate commerce employment under workmen's compensation laws of the State where the injury occurs, in case the employer and employe (as in Michigan) shall have accepted and operate under such an act, and such state acts so drafted as to cover cases of injuries in interstate commerce.[15]

Conclusion

The courts have interpreted and administered the law as they found it and are not privileged to go further in advancing relief measures synchronizing with modern, industrial, urban progress and development.

The Federal Employers' Liability Act sacrifices upon the altar of geographical uniformity too much of the humane aspects of Workmen's Compensation Acts. The ideal of social justice based on compensation for loss of earning power has been shown by the experience of America, England, Norway and Germany to possess more of the elements of social equity as a rule of industry and commerce than the litigious common law ideal of damage awards premised only on proof of negligence.

It is the privilege as well as the exclusive prerogative of Congress to give the remedial relief necessary by enactment of a statute that will itself occupy with authority or permit state law to occupy No Man's Land and thus eventually set up the legal machinery for rendering legal as well as social justice to the injured or the dependents of workmen killed in interstate commerce, through adequate compensation legislation covering all branches of interstate common carrier service, rather than to see them cast by the wayside in too many instances as industrial wrecks without adequate, practical remedy or salvage.

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12. Reason for demand—Cunningham v. Northwestern Impr. Co., 44 Mont. 180, 204. Powers v. Hotel Bond Co., 89 Conn. 145, 147. Evils of personal injury litigation—opinion of McPherson J. in Hawkins v. Bleakley, 220 Fed. 378, 382. Borgais v. Falk Co., 147 Wis. 327, 337, 347-350.

Harshness of common law rules—opinion of Chief Justice Winslow of the Supreme Court of Wisconsin, in Driscoll v. Allis-Chalmers Co., 144 Wis. 451, 468. Dissenting opinion of Miller, J. in Kentucky State Journal Co. v. Workmen's Compensation Bd. 161 Ky. 562, 576-7.

Adams v. Iten Biscuit Co., 62 Okla. 52, 54-55. State Ex rel Davis-Smith Co. v. Clausen, 65 Wash. 156, 209-10. Miller v. City of Milwaukee, 154 Wis. 652, 660-661, 670.

In N. Y. C. R. Co. v. White, 243 U. S. 188, the court very carefully analyzed and approved the underlying social economic purpose and theory upon which Workmen's Compensation Acts are based.

14. Extracts from Bulletin No. 398 supra, at pp. 7 and 32-3.

15. Smith v. Ind'l Com. supra, at p. 603, where the validity of reservations of state jurisdiction is discussed. Maritime carrier employes were sought to be covered so far as the exclusive constitutional general admiralty and maritime jurisdiction of United States laws would permit, by the saving clause of the Admiralty Act of Oct. 6, 1917, 40 Stat. at Large, 395 which attempted to reserve to employes in that service their rights under the Workmen's Compensation laws of the states, but it was held unconstitutional in Knickerbocker Ice Co. v. Stewart, 253 U. S. 149. This case pointed out the distinction between litigation affecting jurisdiction in maritime affairs, and interstate commerce, which the court said should not be forgotten.

Toland's Case, 258 Mass. 470, where there was not so much water under the boat, and Messell v. Foundaton Company, 247 U. S. 427, where the workmen's compensation act of Louisiana, amendment to the Federal employer's liability act incorporated in the maritime law and the general admiralty and maritime jurisdiction were involved and discussed.

Bearing on supreme control of maritime law to exclusion of state Workmen's compensation acts read opinions in Northern Coal and Dock Co. v. Strand, 49 S. C. R. 88-90, decided Dec. 10, 1928. Observe the contact theory of liability suggested in opinion of Mr. Associate Justice Stone.

La Casse v. Great Lakes Engineering Works, 242 Mich. 454, decided June 4, 1928, points out when and only when a State workmen's compensation act may be applicable to recovery for an injury on navigable waters. To like effect, Johnson v. G. T. Elliott, Inc., 146 S. E. (Va.) 298, decided Jan. 17, 1929. Grant Smith-Porter v. Rohde, 257 U. S. 469. Miller's Indemnity Underwriters v. Brand, 270 U. S. 59.

KANSAS JUDICIAL COUNCIL RECOMMENDS LEGISLATION

THE second report of the Kansas Judicial Council has been filed with the Governor. It was made as of Dec. 1, 1928, but the activities of the Legislature delayed the state printer. The first report, 1927, contained 177 pages, and the present one 140 pages. In this report the summary of activities of the district court by counties was omitted, but as in the earlier report the summary was made by judicial districts, of which there are 36.

As the legislature did not meet until the Council was well in its second year, no attention to legislation was given in its first report. But as the legislature of 1929 was to convene soon after the date of the second annual report, legislation began to receive consideration. A number of general recommendations were made, and later ten or a dozen bills were prepared and presented. These were in charge of the chairman of the respective judiciary committees of senate and house. Such chairmen are members of the Judicial Council by virtue of their office.

The recommendations in general are to make the judicial system of the state a unit, to have only judges trained in the law, to transfer judges readily as work may require, to retain them during good behavior, to compensate them adequately and to remove them for the good of the service. It is further recommended that procedure be under rules of the supreme court rather than legislative enactment. And also that clerical officials be appointed rather than elected.

In the matter of a unitary system of courts there is so far no agreement in the Council, but views as to what is a unified system vary from having but one trial court and one appellate court to having district, county, and justice of the peace courts with further power in the legislature to establish other courts in its discretion. All agree on having but one court of appeals. As to jury trials, an early impression in the Council that providing for verdicts by two-thirds or three-fourths or more of the jurors, without requiring unanimity, would be a help, has been somewhat affected by the figures from over the state for the past year tending to show that when juries hang they divide too often six to six, seven to five, to make much difference if, say, three-fourths verdict were authorized.

For the Supreme Court the Council recommends providing efficient law clerks to lessen the burden of research upon the Justices and thereby to enable the Court to decide more cases if business increases. The time to perfect appeal from the trial to the appellate court should be shortened from six months to sixty days, and new trial should be more clearly defined.

For the district court there is recommended the uniform keeping of records, the elimination of delay in disposing of motions, and the entering of judgments and decrees promptly and clearly on the journals. The petition for divorce is suggested to be in the language of the statute, with provision for a bill of particulars if details of fact are desired. The state and defendant should have equal number of peremptory challenges on the jury. The law should be clarified so that either the prosecution may comment on a defendant's failure to testify, or that any such reference must be reversible error. Defendants jointly charged with felony should be triable together or separately in the discretion of the court as is now the law in misdemeanors.

Conspiracy should be a state crime just as it is a federal crime. The state should be enabled to have a change of venue for sufficient reason in criminal cases. A short form of information should be authorized. A fee should be provided for counsel appointed to defend indigent persons on trial.

For probate courts it is recommended that higher qualifications be required for the judges, most of whom now are laymen. No fees should be provided as compensation in addition to the salary. Such judges should not practice law, either in their own courts or elsewhere. When a jury trial has been had there should be no trial by jury de novo of right. In large courts additional judges should be provided and should be permitted to sit at more than one place in the county. The records should be uniform throughout the state.

City courts should be abolished and a general county court substituted with jurisdiction now possessed by such courts and county, probate, juvenile and justice of the peace courts.

For justices of the peace it is recommended that such courts either be abolished or their number greatly limited, and the courts established only in communities where needed and desired. While they continue, justice courts should have provision for appeal on law questions only, so as to prevent the injustice of arbitrary rulings where the defendants are too poor to give bond to pay the judgment if they lose on appeal. The present practice of trial de novo and by jury on appeal, both of civil and criminal cases, after having had jury trial once in the justice court, is strongly disapproved.

Consideration was had of rewriting the entire judiciary article of the state constitution with a view to submitting it to popular vote as an amendment to the state constitution in lieu of the present article. There is some doubt whether an entire aricle is a "proposition" or an "amendment" as these terms are used in reference to constitutional amendments.

Bills offered in the legislature of 1929, drawn by the Judicial Council, provide: For a jury commission to select names from which jury panels may be drawn. For appeals on law points from justice of the peace courts without a bond to pay plaintiffs' claim. For a system of books and records to be prescribed for district courts by the supreme court. For law clerks to justices of the supreme court. For equal challenges of the state and the defense on juries. For conspiracy as a crime, in the language of the federal statute. For defining new trial and limiting right to appeal to sixty days. For permitting trial of civil cases to six

jurors. For creating a county court of general jurisdiction.

The Council have so far been conservative in all their recommendations, and have perhaps been more interested in securing reliable data and in building up a body of court statistics, since nothing of the kind has ever been before assembled in Kansas, than to urge any particular theory or measure of reform.

When the Judicial Council of Kansas was organized June 11, 1927, the time until the first report to the Governor was due to be made, December 1, 1927, was too short for a complete survey of the judicial system of Kansas in its actual workings. Such survey was the first object of the Council. This aim has since been maintained. It is the purpose of the Council to get together the facts concerning the entire judicial system and have them available for general use, and particularly for the Council in its consideration of ways and means of improvement, so as to make the administration of justice as certain, speedy and economical as can reasonably be done.

The 105 clerks of the District courts in as many counties of the state were called upon for information as to court activities for the year ending June 30, 1927, and again for the year ending June 30, 1928. The results of their reports are tabulated in the two successive publications of the Judicial Council, and already afford a basis for beginning comparison. The district court alone has full general jurisdiction in Kansas. The number of cases tried or otherwise disposed of was somewhat greater during the second year of inquiry than during the first. The fact of collecting and publishing data has to some extent stimulated interest in disposing of cases that might otherwise drag.

Around 10,000 civil cases were disposed of each year and 4,000 divorce cases, and 3,500 criminal cases. The number of civil actions other than divorce cases, pending on July 1, 1928, was about 350 fewer than the preceding year. The number of criminal cases was about 200 fewer. But the number of pending divorce cases was about 700 greater than the preceding year, although 400 more had been disposed of in the interval than in the earlier year.

The Council met four times during its first year and five times during its second year up to making the annual reports. The meetings have been at irregular intervals at the call of the Chairman, Hon. W. W. Harvey, Justice of the Supreme Court.

In the second year the Council entered vigorously into inquiry of the probate, city, county, juvenile, justice of the peace, and small debtors courts in addition to continuing work as to the district courts. This covers substantially the whole range of litigation in the state except the police courts, which function in about 750 organized cities of three classes. No inquiry has been made as to the amount or details of litigation in the federal court for the district of Kansas. These fields will probably be considered later.

At once upon organization the Council took up also the problem of rules to be prescribed by the Supreme Court of the state, including also therein a consideration of the relative value of such court and of the legislature as the means for prescribing judicial procedure. A number of rules on matters not covered by statute have been widely discussed over the state by the bar, and a few have been recommended recently to the supreme court for adoption and promulgation.

While from the admission of the state into the Union in 1861 a code of civil procedure enacted by the legislature has been in force for the district courts, amended somewhat liberally in 1909, the probate courts which now handle large values in estates of decedents, and also of minors and incompetents, have little of procedure prescribed. The Council therefore has given much attention to this lack with a view to formulating in detail a code of probate procedure.

The probate courts had 8,500 estates of decedents pending July 1, 1928, and 3500 estates of minors. In the juvenile courts the same judges had 1500 cases pending. County courts which exist in 15 counties under the same judges as the probate and juvenile courts, had disposed of nearly 5,000 cases, civil, misdemeanor, and preliminary, in their history. They were organized at various intervals in the five years since the permissive statute of 1923.

The obsolescence of the justice of the peace courts which are required by the constitution is shown in the fact that out of a possible 3300, fewer than 1,000 were elected and qualified, and only about 300 reported any business.

The city courts, like the county courts, have all the civil and criminal jurisdiction of justices of the peace, and in addition thereto have civil jurisdiction up to $1,000 while $300 is the maximum for a justice of the peace. Seven cities with population varying from 20,000 to 100,000, have city courts. These handled nearly 8000 civil cases, over 1000 preliminary examinations, and nearly 1500 misdemeanors.

Small debtors' courts exist in a few cities to handle claims of not over $20 without expense to poor litigants. The judges serve without pay. In the largest three cities, Kansas City, Wichita, and Topeka, considerable work for the poor has been done in this way. But where the defendants fail to pay judgments nothing effective has been provided or found to effect collection.

The data for district, probate, county and justice of the peace courts are tabulated in detail by counties. The inquiry for the district court is designed to elicit not only the number of cases filed but the number disposed of before trial. When tried the figures show whether by court, jury, or referee. Defaults are indicated. The alacrity or delay in filing answers, and also in trying the cases is indicated, and then the time within which the judgment or decree of the court is actually entered upon the journal.

Similarly the filing, presentation and disposition of motions and demurrers is shown. Finally some light is shed on the costs of the litigation. Cases pending are treated rather briefly to show their number and the length of time pending in eight intervals, varying from less than three months up to over five years. Nearly twice as many cases have been pending less than three months as have been pending from three to six months. About five out of seven on an average

have been pending less than one year.

The divorce data of district courts consider the total number, the number dismissed, the decrees granted and to which spouse, the number of contested cases, the disposition of the children, and the period within which tried after filing petition. Tabulation includes twelve grounds for divorce, although the statute prescribes but ten. Additional grounds are simply combinations of two or more statutory grounds.

For criminal cases attention is given to the speed with which information is filed after transcript, and with which trial is taken up after information filed. Some figures are given on paroles which are granted by the district court or judge, not only from sentences of such court but also from sentences of county and justice of the peace courts. For certain felonies, too, paroles may be granted at any time before actual incarceration in reformatory or penitentiary.

As to pending criminal cases, eight classifications are given of the length of time from three months up to above five years since filing.

J. C. RUPPENTHAL, Secretary.

THE JURY ON TRIAL: A REPLY

Personal Element Usually Involved in Large Generalizations Either for or against the Jury System—Three Elements to Be Considered in Arriving at Correct Appraisal of System—As Operated at Present It Is Source of Delay and Injustice

BY JOSEPH G. SWEET
Member of San Francisco Bar

NOTHING is easier than generalization where the thing generalized about is not susceptible of exact, or even approximately exact, appraisement. The conclusions of the person indulging in generalizations are usually based upon, or colored by, his immediate experiences. It is human to say this is a good world, because recently it has been using me well. This tendency is particularly noticeable in most defenses of, and some attacks upon, the jury system as it now exists. Since few statements concerning it are at all provable, the opinions of the writer, unsupported by sound argument or fundamental analysis, are offered as established reasons for its continuance as an instrumentality for administering justice.

I cannot but feel that Mr. Corbin's article in the October number of The Journal was written in that glow of righteous enthusiasm which usually warms the blood of the lawyer whose client has just had vindication by the votes of twelve of his peers. My conclusion is somewhat justified by the statement of the author, page 509, that

"The jury's homely experience, its touch with human affairs, its constant contact in everyday society with the types of men and women who appear as litigants, endow it with a special ability, an inherent intuition, an innate acumen to see and know what the real facts are. I asked a group of jurors after a trial what they thought of a certain witness who, I was convinced, had testified falsely. They all said they believed he had lied intentionally, but, upon my further inquiry, none of the jurors could explain just how or why he had reached that conclusion. They had sensed the duplicity of that witness. The experience of every trial lawyer teaches him a profound respect for the jury."

Does the conclusion of the necessarily partisan attorney establish the correctness of the decision reached by the jury? Does the fact that the jurors relied upon intuition rather than any process of reasoning necessarily establish their infallibility? Does this, in fact, prove the witness did testify falsely? Is the compromised result of the intuitional workings of twelve untrained minds always necessarily better than the reasoned product of one guided by law and ruled by logic?

It is not by saying, "I deny that any single judge, or group of judges, will give to the true administration of justice any more satisfactory service as the final arbitrators of issues of fact than does the jury—an abstract as it has been called of the citizens at large," that we prove the fact.

The unsupported opinions of eminent lawyers on this question have little more value than those of their humbler brethren. Both are subject to color by the same prejudices and circumstances.

It is safe to say that many of Mr. Corbin's generalizations have been to a considerable extent contradicted by the frequent experiences of most members of the trial bar.

The statement that

"the trial lawyer knows only too well that he cannot talk for the sake of talking to juries. He knows he must keep their attention; that he must stick religiously to the facts or lose their confidence; that he must not waste time in oratory—for present day juries will not brook mere speechmaking, or bickering between counsel, or procrastination at any stage of the trial"—

is not justified by the common experience of the bar. History records and daily experience teaches that many of our most successful damage lawyers are those who constantly indulge in acting and by-play for the very purpose of arousing sympathy or prejudice in the minds of jurors. If the deceased was intoxicated when his automobile ran into the railway train and Christmas is near at hand, it may not be amiss to suggest to the jurors that they collectively act as Santa Claus to the shabbily-clad children seated in the front row.

Mr. Corbin asserts, "That the best trained and most expert judge of witnesses is the man who is

in daily business, social and personal contact with the average run of the witnesses being adjudged." Even this, if granted, does not establish that a jury made up of two housewives, three superannuated mechanics, one street car conductor, one business man and five small tradesmen, is necessarily competent to weigh and determine the nice issues presented by a trial at law.

Mr. Corbin evidently has a model jury in mind when he says:

> "If one would know and understand how much weight the jury accords the remarks and directions of the judge, let him view the scene of action itself. Walk into any courtroom in the state."

Those of us who have seen yawning jurors, drowsily watching buzzing flies as the court read the instructions and have heard those same jurors make light of the instructions after trial, may beg leave to differ with the optimistic author.

There are undoubtedly many cases in which the jury does substantial justice between the parties. But this is obviously not always the rule.

In a case tried in a comparatively large city in California, two automobiles had collided on a public street and one had run up on the sidewalk and injured a woman. The injured woman brought suit against both automobile drivers. Her medical and hospital bills amounted to $1,500. The jury returned a verdict in her favor and assessed damages at $1600. There were six city women on the jury. During the course of the trial it developed that the plaintiff had lived on a farm and milked cows. The city women were of the opinion that a woman that had milked cows was not entitled to damages, no matter what had happened to her. A compromise verdict was the result.

In another case, at the end of six days of trial, the foreman of the jury reached the juryroom with a fixed idea that one of two defendants was the plaintiff.

If we indulge in conclusions, we may reach any result. The lawyer who desires to perpetuate the present system will draw his own conclusions from his own happy experiences. The lawyer who disagrees with him may reach opposite conclusions based upon unhappy experiences of equal probative value.

If we are to arrive at any correct appraisal of the jury system we must consider three elements: (1) *the probable mental caliber and capacity of self-control of the persons constituting the jury;* (2) *the nature of the problems required to be passed upon by that jury;* (3) *the conditions under which they are required to reach conclusions based upon the facts proved.*

1. The old-fashioned democratic doctrine was that all men were created free and equal. Probably, the originators of this doctrine really meant that all persons were born with a right to make themselves, by honest effort, the equals of any other person. However, many Americans came to construe democracy to mean that all persons had equal capacities for the performance of all duties.

The present day jury system seems to have been generated by belief in the latter assumption. If all men are equal, the judgment of twelve ignorant, untrained men is at least as good as the considered conclusion of one intelligent and trained mind. If we assume that all persons—male and female—without regard to native ability, color, or experience, have the understanding requisite for making correct decisions based on intricate facts, then the jury system is a reasonably good means for rendering justice between litigants.

However, this is obviously not the case. The researches of psychologists and scientists and the experience gained from examining large numbers of men during the late war have demonstrated that humans are born with varying mental capacities.

The mental tests given 93,365 enlisted men chosen by draft during the World war, showed the average mental age of these persons to be thirteen and one-tenths years. The mental age of the average white soldier was that of a child between the ages of thirteen and fourteen. It was found that 52.7 per cent were from thirteen to sixteen years in mental age. The remainder were lower in the mental scale. Of 6,188 seniors tested in 320 high schools in Indiana under a system which classified the intelligences in A, B, C, D, E, and F grades, it was found that twenty-six per cent were of D, E, or F, grades of intelligence.

It is probable that persons chosen for jury service, taken as they are from all ranks of life, represent about the same cross-sections of our population called to the colors by the draft.

It is true that many persons chosen as jurors have had a broader experience in life than the young men chosen for military service. However, the intelligence tests have demonstrated that experience does not increase mental capacity—the ability to deal with new problems. And the duties imposed upon jurors usually require the exercise of faculties not generally called into use by the exigencies of every day life.

It will, I think, be generally conceded that the drawing of correct inferences from new and complicated sets of facts is one of the most difficult mental feats. This is what is required in trials at law. May it properly be trusted to persons without previous experience and, on the average, with the mental age of a thirteen year old child?

2. Let us consider the nature of the problems that jurors are called upon to decide.

Are jurors, as a class, mentally qualified to reach a sound conclusion as to which of two experts is correct in his testimony concerning the quality of oriental imports? Are they capable of weighing the testimony of rival geologists?

Litigation arising out of tortious injury to the person furnishes work for most of the juries in our larger cities. The extent and nature of the injury must be established largely by medical testimony. Is a juror who thinks the humerus must be a joke competent to decide between the well qualified Dr. A., who testifies that the plaintiff has no demonstrable injury and Dr. B., of doubtful reputation, who gravely swears that the bruising of the os calcis may ultimately produce a tumor of the medulla oblongata?

Are people of average mentality, untrained in the practice of self-restraint and the exercise of judicial faculties, capable of laying aside sympathy and prejudice so that the case may be decided on its merits?

The obvious reply is that judges are not infallible. This is true. But judges are of necessity persons with certain mental attainments. They

have been trained to act with restraint, to weigh facts and investigate the relative merits of conflicting theories. More than this, they are not required to decide on the instant—reflection and study may be called in to aid in the decision of the case.

3. Are the conditions under which juries are required to make their decisions such that an intelligent decision might be expected from intelligent persons?

Our appellate courts blandly assume that each juror heard and remembered all of the testimony. This, though, the trial consumed weeks. A careful judge, trained to remember testimony, will generally require parts of the testimony to be written up for his use where the case is close and of long duration. Counsel, familiar with the facts in advance of trial, have portions of the testimony transcribed for use in argument to the jury. All recognize that trained minds cannot assimilate all of the evidence and, still, we assume that untrained minds of ordinary intelligence have.

The fact that a jury is composed of twelve persons adds to the difficulty. Twelve people, seeing a football game, will differ radically upon details and essentials. Twelve persons listening to testimony as elicited on the witness stand, upon subjects foreign to their experience, and forced to reach a conclusion must inevitably render a verdict that is based upon hazy recollection and which is the result of compromise and contest.

And the jury, in most states, must pass upon all issues of fact—must decide them in one gulp. The speed of automobiles, the credibility of strange witnesses, the relative skill and honesty of physicians must be settled at one sitting.

And the instructions! They are usually read to the jury by the judge and the reading may take anywhere from twenty minutes to two hours. Abstract propositions of law are read to twelve persons who know nothing of legal principles and, on the instant, these persons are asked to apply these legal principles to facts which they may have forgotten.

Formerly, appellate courts assumed that the jury understood each instruction given, in the exact language in which it was read. The instructions were carefully scrutinized and reversals for erroneous instructions common. As time passed, the courts of appeal apparently unconsciously reached the conclusion that the instructions didn't count for so much after all and so the rules were liberalized. Nowadays, it is the fashion to assume that the jury understood the instructions as a whole and harmonized them and that one erroneous instruction was of little consequence, if the general tenor of the instructions was in accordance with law. The latter assumption is perhaps worse than the former. Everyone recognizes that the jury did not understand all of the instructions. No one can say that the erroneous instruction was not the only one remembered and applied by the jury. Either way we take it, it is pure speculation.

The consideration of a few instructions reveals the absurdity of the whole system. Fancy a jury composed of twelve average laymen understanding, remembering and applying forty separate instructions, of which the following are types:

(a) In an action for damages for personal injuries, the defendant meets and overcomes plaintiff's prima facie case when he balances it evenly, without proving absence of negligence by a preponderance of evidence, or by offering evidence tending to show that plaintiff's injuries were the result of an unavoidable accident.

(b) The defendant in his answer has raised the question of contributory negligence. Contributory negligence is such an act, or omission, on the part of a person amounting to want of ordinary care, as concurring or co-operating with the negligent act of the defendant was the proximate cause of the injury complained of.

(c) If you find from the evidence that the plaintiff was guilty of contributory negligence, and that such contributory negligence was a concurring and proximate cause of the accident, it does not matter whether the chauffeur in charge of the automobile in question was negligent, for under such circumstances, your verdict must be against the plaintiff and in favor of the defendant.

(d) The law will not weigh the degree of negligence of contending parties. Therefore, I charge you, even though you should find the chauffeur in charge of plaintiff's car was to some extent negligent, yet if you find that plaintiff was negligent in the slightest degree, and that such negligence was a concurring and proximate cause of the accident, he cannot recover and your verdict should be for the defendant."

If twelve lawyers, not familiar with the trial of tort cases, should be placed in a jury box and the usual set of instructions read to them, they would spend hours arguing over the law given them by the court. This is just one more of the patent absurdities underlying our present jury system.

The tendency of modern life has been toward the scientific solution of business and social problems. The stress and complexity of our highly developed civilization demand that this shall be so.

In the days when litigation had to do largely with local problems, when those problems were simple, and when practically everyone in the community was capable of understanding them, and did understand them, the jury system was a fairly satisfactory means of disposing of litigation. Today conditions have entirely changed. Wide knowledge and accurate and controlled thinking are essential to the disposition of suits at law. It is plain that the jury system does not bring these to the administration of justice.

It is highly improbable that the jury system will, in our generation, ever be entirely abolished. Perhaps, with radical modifications, it should be retained, but, as it now stands, it is an apparent source of injustice, delay and appeal. It assumes that persons with no training in the self-restraint necessary for the discharge of judicial functions have it. It assumes that the unfit may perform the duties of the fit and, above all, it calls upon ignorance to sit in judgment upon learning. It is about as well fitted to the needs of modern society as a smooth bore musket to those of a modern marine.

How Each Member Can Help

On the last page of this issue of the Journal is printed the regular application blank for membership in the American Bar Association.

It is for the convenience of members interested in the growth and progress of the organization of which they are a part and who are willing to help increase its membership.

LETTERS OF INTEREST TO THE PROFESSION

The Eighteenth Constitutional Amendment — Its Purpose, Review and Suggestions for Action

What to do with the Eighteenth Constitutional Amendment, how to make it effective, remove existing disrespect and restore confidence in our Constitution and laws, is a great, if not the greatest problem confronting our people and government.

This problem must be largely solved by the lawyers and judges of our Country. A deep, personal interest has prompted an investigation, review and discussion of the subject which is submitted with the hope that it may interest the readers of the JOURNAL and assist in the solution of this great problem.

To wisely consider the subject, we must turn the searchlight of experience upon the course of action.

Following the Civil War, the Thirteenth, Fourteenth and Fifteenth Amendments to our Constitution were adopted, prohibiting slavery, guaranteeing to our citizens equal rights and protection of the laws and the right of citizens to vote whether black or white.

The Legislative action of Congress upon these amendments aroused a bitter controversy between the citizens of the North and South, the Northern citizens unwisely assuming that the language of the Fifteenth Amendment "The right of citizens to vote shall not be denied on account of race, color, etc." granted to the Negro an unqualified right to vote. The citizens of the Southern States justly rebelled.

Disrespect of these amendments became more menacing and far more dangerous than the present disrespect of the Eighteenth Amendment. The Southern States to preserve their rights adopted constitutional amendments restricting by qualifications the right of suffrage. Very bitter and most unwise and expensive litigation followed. It took over forty years to iron out this controversy by numerous decisions of our Supreme Court.

The object of our citizens in adopting the Eighteenth Amendment was to secure *temperance*, and to advance the *moral standard* of our people and to that end, the purpose of the amendment was most wisely expressed simply prohibiting the manufacture, sale or transportation of intoxicating liquor for *beverage purposes* and granting to Congress and the States concurrent power to enforce it by appropriate legislation.

Congress, disregarding the history and unfortunate experience under the Fifteenth Amendment, promptly passed over the veto of President Wilson the so-called Volstead Act embracing most unwise, illogical and unreasonable provisions, which, with the stringent regulations authorized and the unwise character of enforcement, has justly aroused the disrespect of our citizens.

The Eighteenth Amendment is aimed directly at the *intoxicating beverage evil and that alone*. No other uses of liquors are denied.

The art of making intoxicating liquors was known and practiced many hundred years before the Christian era. All countries from that time to the present have made and used an intoxicating drink of some kind. Our citizens by adopting the Eighteenth Amendment desired the manufacture, sale and transportation of intoxicating liquors for *beverage purposes* stopped and by law prohibited. They do not desire to prohibit the beneficial effects of liquors if in the judgment of a reputable physician it should be used, but Congress, by the Volstead Act and the unreasonable restriction on the prescription and use of such liquors, has impugned the judgment of the physicians of our country and challenged their integrity.

The Supreme Court has fortunately reviewed the law and the power of Congress conferred by the Eighteenth Amendment. Rhode Island State vs. Palmer et al 253 U. S. 350; Rupert vs. Coffey, 251 U. S. 261; James Edwards Breweries vs. Day et al, 265 U. S. 554.

The Court has adjudged:

(1) That the Eighteenth Amendment was lawfully adopted.

(2) That Congress has the right to ascertain and declare what degree of alcohol in volume would or would not constitute an intoxicating beverage.

(3) That Congress has the right to authorize and regulate the manufacture and sale of intoxicating liquors for medicinal, sacramental and other beneficial purposes.

(4) That Congress has exercised its lawful right and declared that spirituous and vinous liquors are beneficial for medicinal purposes and has provided for such uses by regulating and licensing measures.

(5) That Congress has made investigation and declared that malt liquors have no medicinal value and cannot be used for medicinal purposes.

(6) The Supreme Court in cases hereinbefore cited has clearly defined the power of Congress under the Eighteenth Amendment not only *expressed* but *non enumerated* and implied powers.

Congress is not empowered by legislation or regulations under the Eighteenth Amendment to trespass upon the constitutional rights of citizens in the ownership of intoxicating liquors *not held* or *sold* for beverage purposes. People vs. Marxhausen, 204 Mich. 559; U. S. vs. Stusser, 270 Federal 818; Silverthorne vs. U. S., 251 U. S. 385.

The foregoing review of similar experience and the judgment of our Courts justifies the following action:

(1) Congress should authorize our Government through the proper agency to purchase or cause to be manufactured from time to time and hold under its control and distribution a sufficient quantity of good, pure, spiritous and vinous liquors required for medicinal, sacramental, and other lawful purposes.

(2) The narrow restrictions contained in Section 7 of the Prohibition Act passed over the veto of the President October 28, 1919, that unjustly impugn the judgment and challenge the integrity of the reputable physicians of our country, should be materially broadened so as to recognize the constitutional right of citizens to the use of medicinal liquors and the right of physicians to prescribe the same, trusting to their judgment as to quantity, the Government reserving the right to cancel the license in case of the abuse of the privilege granted.

(3) To encourage temperance and permit the enjoyment of our people of a palatable non-intoxicating beverage, Congress should investigate and determine what degree or volume of alcohol in malt liquors would create intoxication in the normal man. From the decisions of our Supreme Court, it is manifest that should Congress determine that three per cent. in volume in malt liquors would not create an intoxicating beverage, the same would be sustained by the Courts. The manufacture and sale thereof under Government supervision and regulation should be made similar in character to the present laws governing the manufacture and sale of the so-called unsatisfactory near beer.

(4) Like consideration and action should be taken for the use of non-intoxicating vinous beverage.

(5) The Government enforcement agency should be primarily used to ferret out, capture and punish the illicit manufacturer, smuggler and bootlegger engaged in the traffic of intoxicating liquors for beverage purposes. Throttle the source at the fountain head and the evil will be largely abated.

(6) Congress should levy a revenue tax upon all liquors authorized as hereinbefore indicated including non-intoxicating malt and vinous beverages sufficient to cover the expense of supervision, regulation and prosecution of violations of such laws.

(7) The enforcement of the Prohibition Act and the prosecutions for violation thereof should be transferred to the regular law-enforcing officers of our Government.

The adoption of the foregoing modifications of the law would promptly dissipate the present misconception of the purposes of the Eighteenth Amendment, restore confidence in the preservation of the rights of our citizens, promote temperance and materially advance efficient enforcement of the Eighteenth Amendment.

JOHN B. CORLISS.

Detroit, Mich., Jan. 2.

Mr. Dooley on the Shakespeare-Bacon Controversy

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

The learned James M. Beck in an advanced publication, in your March issue, of his introduction to a book hereafter to appear and called "Shakespeare and the Law" by Sir Dunbar Plunket Barton, has missed, to my mind, the most sapient comment uttered on the Bacon-Shakespeare controversy. I refer to and quote, perhaps inaccurately but with correct effect, Mr. Dooley's (J. P. Dunne) observation: "Of course Shakespeare did not write them plays. Another man by the same name wrote 'em."

ALFRED SELLIGMAN.

Louisville, Ky., Feb. 28.

Why Lawyers Should Not Advertise

Editor, AMERICAN BAR ASSOCIATION JOURNAL:

In the February number of the Journal Professor Harrison Hewitt, of the Yale School of Law, asks what reasons exist, other than not comporting with the dignity of the profession, for the prohibition against professional advertising while advertising is always permissible in business.

The reasons are fundamental to the very nature of the differences existing between the professions and business. In the latter a man buys and sells goods, wares and merchandise. It is perfectly natural and proper for him to puff the value and quality of his wares. He deals wholly with tangible objects whether those objects consist of papers of pins, lead pencils or locomotive engines. His income is derived from profits on the turn-over of his sales.

But the professional man has no goods for sale. His capital is not the merchandise upon his shelves or in his warehouse, but his ability, his experience, his education and training. He is not permitted to hold out his ability as superior to that of his competitors nor to boast of an experience as rendering his services more valuable than theirs. In other words, a man may advertise his wares but not his brains.

It may be further noted that the ethics of business does not permit a business man to advertise the particular ability which has made him successful over his rivals. Even though his goods are superior to theirs, his success beyond theirs depends upon the superior qualities of brain and intelligence, and in these respects he is limited in his advertising even as the professional man is limited.

HENRY C. GARDINER.

San Diego, Cal., Feb. 18.

What Kind of a Man Should a Lawyer Be?

Editor, AMERICAN BAR ASSOCIATION JOURNAL:

Dr. Harrison Hewitt's open letter (Journal for February, 1929) regarding the rule prohibiting advertising by lawyers and his statement of the reasons he has found therefor are very interesting. Especially interesting is the apparent difficulty encountered in formulating reasons for the rule. In response to his invitation for suggestions, may I be permitted to offer the following:

It would seem that the question, Why should not a lawyer advertise? is but a corollary to the question, What kind of a man should a lawyer be? I still retain certain youthful ideals notwithstanding they are so seldom realized, to wit: A lawyer should be a gentleman; his character should be of the highest; and he should be cultured, learned and able. These are personal qualities and a man is known to possess them not because he broadcasts that he has them, but because of the life he has lived. The mere attempt, or even the desire, to assert them stamps a man as not having them. The necessity for canons of ethics is a reflection upon the profession as a whole, but it must be admitted that ideals are usually impracticable.

I have added regard for the writer of the letter mentioned above because his conviction is instinctive.

CONSTAN JENSEN.

Los Angeles, Feb. 7.

Contingent Fee Accident Litigation

Editor, AMERICAN BAR ASSOCIATION JOURNAL:

I have looked with considerable interest upon the articles published in reference to "contingent fee accident litigation"; and I have read with a good deal of interest, the number of curt names applied to practitioners.

The standard of the Bar ought to be the highest of any profession that there is, because it has to do with all other businesses; but it seems that the standard of truthfulness and honesty has been absolutely overlooked by all of our writers, who have undertaken to dissect the practice along these lines.

I think it is most unfortunate that men who become influential in the profession, undertake to brow-beat and keep down worthy young men who wish to enter the profession and have the best of motives and the highest of ideals, but no means of making themselves felt in the business and professional world. It is not likely that any young lawyer without some kind of pull can get in the current of profitable practice without his starvation period. I think it by far better to excuse errors and mistakes in the young in practice, than for the powerful in practice and in business to so characterize such aspiring and worthily ambitious men in efforts to gain a position of accomplishment for the benefit of humanity.

It is somewhat disgusting to see article after article by men of great prominence and who have attained considerable fortune and fame, denouncing this class of worthy aspirants as *ambulance chasers, lead men,* and *runners,* and various other similar nomenclature.

The most offensive characters, according to our observation, are those exceedingly prominent in the defense of corporations, and who have hirelings, even preceding the accidents, for the purpose of obtaining releases, absolving the corporation from real meritorious cases. We don't see any of these great lawyers writing articles that such practices should be condemned, even mildly, but we believe that if the moral sentiment of the members of the American Bar could be obtained, that they would not only be relieved of their practice entirely, but the attempt at such imposition upon ignorance and taking advantage of necessities, would be punishable on the criminal side of the Court, as well as the corporation being made liable for an additional heavy penalty. Legislation along this line has been attempted but there are so many of our Judges who have previously engaged in the defense of corporations that it is difficult to get a fair deal.

Everyone knows from observation, if he has had any experience worth while, that the plaintiff in accident litigation in a majority of the cases, is perfectly helpless, unless a contingent arrangement can be perfected. No matter how meritorious his case may be, he would be compelled to bear all of the wrong put upon him by the wrongs of others, were it not for the charity of many lawyers who are willing to make an investigation, whether for compensation or not.

J. R. EARLE.

Walhalla, S. C.

"Thanking the Jury—and the Reverse"

Editor, AMERICAN BAR ASSOCIATION JOURNAL:

The article on "Thanking the Jury—and the Reverse" seems to have attracted considerable attention across the Atlantic. This morning, I have received from a "Scots Cousin" of mine a letter which says:

"My Dear Lord and Cousin:—I have read in the Law Times, your screed on "Thanking the Jury,&c.,"; and I wondered at your not saying something of the abolition of the practice of paying the Jury in Scotland, in Exchequer cases. You will find the story in *Glasgow, Past and Present,* Vol. 1, p. 295 . . . . "

The following is the account, somewhat abbreviated, taken from *The Book of Glasgow Anecdotes,* pp. 294, 295:

"The public of Scotland is indebted to Mr. Robert M'Nair, merchant in Glasgow, for obtaining the abolition of a shameful custom, which in olden times, existed in our Exchequer Court. It was the practice in all Exchequer trials, for the Crown, when successful, to pay each juryman one guinea, and to give the whole of them their supper. It happened that Mr. M'Nair had got into some scrape with the Excise, and an action was raised against him in the Exchequer Court at Edinburgh. When the case came to be called, the Crown Advocate, after narrating all the facts and commenting on them, concluded his address to the Jury by reminding them that if they brought in a verdict, they would receive a guinea each and their supper. Upon hearing which Mr. M'Nair rose up, and asked the Judges if he might be allowed the liberty of speaking one word to the Jury: to which request, the Judges readily assented. Mr. M'Nair then turned round to the Jury and thus addressed them: 'Gentlemen of the Jury, you have heard what the learned Advocate for the Crown has said, namely that he will give you a guinea each and your supper, if you bring in a verdict in favour of the Crown. Now, here am I, Robert M'Nair, merchant in Glasgow, standing before you, and I promise you two guineas each and your dinner to boot, with as much wine as you can drink, if you bring in a verdict in my favour'; and . . . sat down. The trial went on, and Mr. M'Nair obtained a verdict in his favour. After this trial, the Crown never made any attempt at influencing the Jury by this species of bribery."

I am not to be taken as vouching for the truth of this delectable story; but, *Si non è vero, è ben trovato.*

WILLIAM RENWICK RIDDELL.

Osgoode Hall, Toronto, Feb. 4.

Federal Valuation of Railroads

Editor, AMERICAN BAR ASSOCIATION JOURNAL:

I inclose a description of a digest of proceedings in the Federal Valuation of Railroads, which I compiled.

Among the 18 volumes of text are separate volumes devoted to land, grading, ballast, tracklaying and surfacing, equipment, buildings, interest during construction, general expenditures, other investment accounts, appreciation, depreciation, working capital, going concern value, accounting, bringing values to a date certain or range and trend of unit prices, inventory instructions, regulations and notices of the Interstate Com-

merce Commission and a separate volume of practice and procedure before the Interstate Commerce Commission in Federal valuation cases and "re-capture" (of excess earnings under the Transportation Act).

A small number of the encyclopedia and index volumes have been reproduced by blue-printing and put on file with some central organizations. My negatives for reproducing these are tendered gratis to anyone who desires reproductions of all or any of the 18 volumes.

It has been rather definitely decided that publication of the 9000 pages of text in 18 volumes and an index thereto of 1000 pages will not be undertaken by me. I compiled it as an incidence to my duties as valuation attorney in preparing, trying and briefing the Federal valuation cases of the Wabash Railway Company and the Des Moines Union Railway Company. I have completed these special retainers and returned to private practice. These compilations having served for me the primary purpose of making them, I wish their contents might be available to others who could use them. For this I seek no remuneration.

I tender gratis this research of mine to lawyers and specialists who represent local and interstate public utilities, investment banks, other corporations, trusts and clients of wealth and diversified holdings in issues as to rates, taxes, income, financing, consolidations, excess earnings, re-organizations, etc. before courts, commissions, boards, bureaus, etc. — Federal, State or municipal.

L. D. McPHERSON.

311 Marquette Bldg., 140 S. Dearborn St., Chicago, Ill.

The Law's Contribution

Editor, AMERICAN BAR ASSOCIATION JOURNAL:

At a time when the journalistic world is giving credit to the factors of civilization for which we are thankful and upon which we base our hopes for the future, I have thought that the contribution of Law should not be overlooked. I am therefore sending you a prose-poem on the subject.

I AM THE LAW

I AM THE LAW

Out of the elements of civil chaos I assembled ORDER.

I applied ORDER to groping humanity and evolved GOVERNMENT. Through GOVERNMENT I brought into being the great institutions of LIBERTY AND PROPERTY.

I AM THE LAW

I released HEALTH and unchained the body; I freed SCIENCE and unshackled the brain; I fostered RELIGION and emancipated the SOUL.

I turn the wheels of PROGRESS, make CIVILIZATION secure and fill the hearts of men with aspirations for TRUTH.

I AM THE LAW

But I come not uninvited and stay not if unwelcome.

Without me mankind falls back into the yawning chasm of confusion, ignorance and despair.

Following me with faltering footsteps all humanity is half slave and half free.

Yet but let my extended hand be grasped with full acceptance and I shall lead the nations of the earth to the heights of a new Olympus where JUSTICE shall reign supreme and DIVINE forces unfold the manifest destiny of man toward the perfection of human love and achievement, preserved by me through the ages for his universal inheritance.

I AM THE LAW

MILTON COLVIN.

New Orleans, December 10, 1928.

Death of Hon. Platt Rogers

Editor, AMERICAN BAR ASSOCIATION JOURNAL:

I have not seen any note of the death of Platt Rogers on Christmas Day last. He was born in New Jersey, I think in 1851, graduated from Columbia and came to Colorado in the 70's. He became one of our most influential figures in the West. He was Mayor of Denver, Judge of the Criminal Court, and ran for Lieutenant Governor at one time. He was President of the State Bar Association and presided as such at the 1901 meeting of the American Bar in Denver. He was afterwards a member of the Executive Committee of the American Bar. He is not in Who's Who because he always refused to answer their questions. He was very intimate with the older leaders and presidents of the American Bar. He practiced first in Evans, Colorado, then in Boulder, then in Denver. He leaves his widow and five children, all grown and married, of whom one is the wife of United States Senator Lawrence C. Phipps. He was an important figure in irrigation law, argued the Colorado-Kansas Case and gave an address on the topic before the American Bar in 1901. He originated the plan to

decorate the gavel of the American Bar Association with silver bands at its first meeting in Denver and tells the story in the 1927 Colorado Bar Reports.

JAMES GRAFTON ROGERS.

Boulder, Col., March 1.

Why Gentlemen Go Mad

"A practical 'jokee' misplaced her fingers when notice was sent to Mr. H. F. Horner of Fargo, advising him of his appointment as Vice-Chairman of the Committee on Citizenship, the designation reading, 'Vice-Chairman for the First Congregational District.' Mr. Horner claims to be a 'howling Methodist,' insists that we assume responsibility for the error, and demands that we give proper publicity to the correction. Fear of what may otherwise be in store for us causes us to make this public apology. As we are in the same category as Mr. Horner, however, we are not certain whether the apology should be to Mr. Horner or to the Congregational District, so we just apologize generally."—*From N. D. Bar Briefs.*

Leading Articles on Current Legal Periodicals

(*Continued from page 232*)

Affirmative Pleas Under Modern Codes and Practice Acts, by Alison Reppy; Discretion of Courts in Actions to Dissolve Municipal Corporations, by Charles W. Tooke; A Suggested Revision of the Statutory Treatment of Service by Publication, by Jay Leo Rothschild; Principles Applicable to Consolidation and Merger of Public Utilities, by William M. Wherry; Merger of Law and Equity under Codes and Other Statutes, by William F. Walsh.

California Law Review, January (Berkeley, Cal.)—National Bank Taxation in California, by Roger J. Traynor; Billboard Regulation and the Aesthetic Viewpoint with Reference to California Highways, by Chauncey Shafter Goodrich; The Institute of Jurisprudence, by George H. Boke; Death of Professor George H. Boke, by Orrin K. McMurray.

University of Pennsylvania Law Review, February (Philadelphia)—Amenability of Foreign Consuls to Judicial Process in the United States, by Julius I. Puente; The Desirability of Consolidating the Uniform Commercial Statutes, by Ralph S. Bauer; Breach of Promise Suits, by Robert C. Brown; Principal Characteristics of Legal Policy in the Recent European Drafts of Criminal Laws; a Comparative Study, by Kurt Junckerstorff.

The Lawyer and Banker and Central Law Journal, January-February (Detroit, Mich.)—The Tweedledee and Tweedledum Analysis of Ambulance Chasing, by A. A. Golden; Imperfect Titles from Void Marriages, by W. H. Coudert; Recent Problems of Park Boards, by Paul J. Thompson; Amending the Federal Constitution, by F. G. Bromberg; Crime, by T. Seton Jevons.

Texas Law Review, February (Austin, Tex.)—Harbor Workers and Workmen's Compensation, by George William Stumberg; The Creation of Corporate Shares in Return for Promissory Notes, by J. S. Waterman; The Texas Board of Water Engineers, by F. Joyce Cox.

Kentucky Law Journal, January (Lexington, Ky.)—The Right of Privacy, by George Ragland, Jr.; Deviation and Departure by Servant, by Elizabeth T. Rouse; Obstruction of Passways, by James N. McPherson.

Yale Law Journal, February (New Haven, Conn.)—On the Study of Legal Science, by Cassius J. Keyser; The Summary Judgment, by Charles E. Clark and Charles U. Samenow; Workmen's Compensation and the Maritime Law, by Stanley Morrison.

American Law Review, January-February (St. Louis, Mo.) Who Owns The Air Space, by John A. Eubank; Promissory Estoppel in the Law of Contracts, by Henry W. Humble; The History of Human Sterilization in the United States—Theory, Statute, Adjudication, by J. H. Landman; Principles of Motor Carrier Regulation, by John J. George; Massachusetts Homicide Trial According to Due Process of Law, by G. E. Wire.

Harvard Law Review, February (Cambridge, Mass.)—The Rationale of Vicarious Admissions, by Edmund M. Morgan; The Narrative Record in Federal Equity Appeals, by Erwin N. Griswold and William Mitchell; Incorporation, Multiple Incorporation, and the Conflict of Laws, by Henry E. Foley.

Cornell Law Quarterly, February (Ithaca, N. Y.)—The Court of Appeals of New York; Some Features of its Organization and Work, by Frank H. Hiscock; A Remedy for Election of Remedies, by Jay Leo Rothschild; The Person versus The Act in Criminology, by E. H. Sutherland; Delegata Potestas non Potest Delegari; A Maxim of American Constitutional Law, by Patrick W. Duff and Horace E. Whiteside.

Law Notes, January (Northport, N. Y.)—Preventive Justice, by W. A. Shumaker; Offense of Unlawful Assembly as a Limitation on the Right to Assemble, by Lawrence A. Stith.

Law Quarterly Review, January (Toronto)—The Use of the Injunction in American Labor Controversies, III, by Prof. Felix Frankfurter and Nathan Greene; Petitions of Right, by Prof. L. Ehrlich; Calendar of Charter Rolls, by H. G. Richardson; French Criminal Procedure, II, by A. C. Wright; The St. Anne's Well Brewery Co.'s Case, by W. T. S. Stallybrass; The First Legal Execution for Crime in Upper Canada, by the Hon. Mr. Justice Riddell.

Philippine Law Journal, January (Manila)—The Necessity of Establishing a Court of Claims in the Philippines, by Modesto R. Ramolete.

Illinois Law Review, March (Chicago)—Consular Protection of the Estates of Deceased Nationals, by Julius I. Puente; Corporate Directors as Trustees in Illinois, by Sveinbjorn Johnson; A Functional Approach to the Law of Business Associations, by Williams C. Douglas; Some Difficulties in the Way of a History of American Law, by Eldon R. James.

Marquette Law Review, February (Milwaukee, Wis.)—Excess Condemnation in Wisconsin, by Walter H. Bender; Is Declaratory Relief Constitutional? by Clifton Williams; Airports, by Carl Zollmann; Validity of Use of Set-Back Lines for Street Widening, by Clifford E. Randall.

Minnesota Law Review, February (Minneapolis, Minn.)—Problem of Preserving Excluded Evidence in the Appellate Record, by William Wirt Blume; Discontinuance of Service by Public Utilities, by Ford P. Hall; The Validity of the Acts of Unrecognized De Facto Governments in the Courts of Non-Recognizing States, by N. D. Houghton.

Law Notes, February (Northport, N. Y.)—Escaping the Income Tax, by W. A. Shumaker; The Law and the Physician's Fee, by Minor Bronaugh.

Southern California Law Review, February (Los Angeles, Cal.)—The Proximate Cause in the Legal Doctrine of the United States and Germany, by Rudolph Hirschberg; The Tort Liability of Public Officers Who Act Under Unconstitutional Statutes, by George N. Crocker; The Beginning of the Legal Clinic of the University of Southern California, by John S. Bradway.

Alabama Law Journal, January (University, Ala.)—A Neglected Clause of the Federal Constitution, by Jesse F. Hogan; The Alabama Workmen's Compensation Act, by William Henry Beatty; The Alabama Rule Against Perpetuities, by Edward W. Faith; Constitutionality of the Alabama Rules-of-Court Statute, by Frederick G. Bromberg.

Legal Aid and Local Bar Associations

"The annual report of the legal aid committee of the Decatur Bar Association, of which M. E. Morthland is chairman, indicates the type of the excellent service which is being done by Legal Aid Committtees of Local Bar Associations of Illinois. In addition to advising the Social Service Bureau on minor legal matters, the committee has given assistance in the following varied types of cases:

"Secured court order for support of minor child in divorce case.

"Advised a man seeking to enforce a mechanic's lien for collection of wages due him that he could retain an attorney in view of the fact that money was to be collected.

"Secured decree of divorce with custody of child for woman whose husband was serving at Chester Penitentiary for felony.

"Obtained a trial and secured an acquittal for a man, suffering from pulmonary tuberculosis, who was incarcerated in the Macon county jail charged with forgery.

"Served notices on a daughter who was seeking to dispossess her mother from a piece of real estate in which she had granted a life tenancy to the mother.

"In addition, a great amount of time and service was rendered by attorneys who were appointed by the court to defend persons charged with crime.

"The Legal Aid Committee has found that officers of the Court are very willing to assist in the work of furnishing legal services to those who cannot pay for the same."—*From Quarterly Bulletin of Ill. St. Bar Assn.*

Review of Recent Supreme Court Decisions

(Continued from page 222)

of control over it for his own benefit then ceased and as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift *inter vivos* not subject to the tax.

With regard to the second contention the Court said in part:

> But the question much pressed upon us remains whether, the donor having parted both with the possession and his entire beneficial interest in the property when the trust was created, the mere passing of possession or enjoyment of the trust fund from the life tenants to the remaindermen after the testator's death, as directed, and after the enactment of the statute, is included within its taxing provisions. That question, not necessarily involved, was left unanswered in *Shukert v. Allen*. . . . There the gift of a remainder interest, having been made without reference to the donor's death, although it did in fact vest in possession and enjoyment after his death, was held not to be a transfer intended to take effect in possession or enjoyment at or after the donor's death, and for that reason not to be subject to the tax. But here the gift was intended to so take effect, although the transfer which effected it preceded the death of the settlor and was itself not subject to the tax unless made so by the circumstance that the possession or enjoyment passed as indicated.
>
> It its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. . . . It is not a gift tax and the tax on gifts once imposed by the Revenue Act of 1924, c. 234, 43 Stat. 313, has been repealed, 44 Stat. 126. One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos*, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute.

In conclusion it was pointed out that certain doubts resultant upon adopting the government's contentions should be resolved in favor of the taxpayer or in favor of such construction as would uphold the constitutionality of the Act.

The case was argued by Mr. T. H. Lewis for the government and by Messrs. J. F. Dammann and William B. McIlvaine for the executor.

NEWS OF STATE AND LOCAL BAR ASSOCIATIONS

New York

New York Bar's Fifty-Second Annual Meeting

The Fifty-second Annual Meeting of the New York State Bar Association was held in New York Friday and Saturday, January 18 and 19. The business sessions of Friday and Saturday forenoon and afternoon were held at the House of the Association of the Bar of the City of New York, No. 42 West 44th Street. The Annual Address was given and the reception on Friday evening, January 18, and Annual Banquet on Saturday evening, January 19, took place at Hotel Astor, the headquarters hotel.

William C. Breed, President of the Association, presided at the professional sessions and the business functions. In his annual address, he reviewed what the Association had done since 1928, a gratifying record; called for a perfection of Bar organization and service; considered the public attitude toward the administration of justice, the Bar and the Bench; and advocated a survey to determine just where the administration of Justice in the State failed and broke down.

"In conducting such a survey," he said, "the best talent in the State should be employed by the Committee in charge, and the cooperation of other organizations representing business and the public should be sought, such as Chambers of Commerce, Merchants Associations and Trade organizations. They know the evils and ills. Some have made extensive studies of the questions involved. All are deeply concerned. They would eventually help to create and crystallize the public opinion that in many cases may be necessary to insure action, either by Court or Legislature.

"The value to be derived from such a survey is so great that in my opinion there should be little difficulty in raising the necessary funds to carry it on, either within or without the profession, and certainly without the necessity of placing any annual increased financial burden upon our members at large.

"Included in this survey there should be a study of what is known as the Judicial Council, which is now operating in eleven States. I believe that such a survey would disclose the fact that the establishment of a Judicial Council, with broad authority and with the financial backing of the State, would be the best method of working out a cure for many of the troubles of which the public complains."

The Annual Address was delivered by the Honorable Owen J. Roberts, of the Pennsylvania Bar. The following other addresses were delivered: "Functions of the Trust Company in the Field of Law," by Robert H. Jackson; "The Baumes Laws," by the Honorable Caleb Baumes; "Aviation Law," by Mr. Chester W. Cuthell; "Ambulance Chasing—Its Evils and Remedies Therefor," by Isidor J. Kresel; "State and Private Rights to Real Property," by Anson Getman; "Fewer Lawyers and Better Ones," by Professor I. Maurice Wormser.

The Executive Committee and the Committee on Law Reform, performing a by-law duty, selected as the principal subject for discussion at the annual meeting, the Proposed Changes in the Decedents' Estates Law, as recommended by the Commission heretofore appointed to investigate the defects in the laws of estates, of which Commission the Honorable James A. Foley, Surrogate of New York County, is Chairman, and Carlos C. Alden, Counsel. This subject was presented by the Honorable George A. Slater, Surrogate of Westchester County, New York, Chairman of the Committee on Legislation; and general discussion was preceded by related addresses made by distinguished lawyers from the several Judicial Districts of the State.

The Secretary of the State Bar Association announced that headquarters for the use of members of the Association, have been established at Albany, where a working library, stenographic service, facilities for meetings, conferences, etc., are available for members attending the Appellate Courts and the meetings of Legislative Committees, and State Commissions and Departments at Albany.

A dinner was tendered by the Association on Thursday, January 17, to the Presidents and representatives of the local Bar Associations throughout the State. The arrangements were in charge of Martin Conboy, Chairman of this Special Committee. The annual banquet was given on Saturday evening, Jan. 19.

The Judicial Section of the State Bar Association, organized in 1924, to afford opportunity to judges from all parts of the State of New York to meet and create and renew acquaintance with their brother justices throughout the State, under its present officers, Mr. Justice Edward J. McGoldrick, of New York, chairman, and Mr. Justice Harold J. Hinman, of Albany, Secretary, held an interesting meeting on Saturday morning, January 19, followed by luncheon.

CHARLES W. WALTON,
Secretary.

Colorado

Denver Bar Hears Address on Our Foreign Policy

It is a far cry from Denver to either seaboard and yet Denver lawyers, judging by the attendance at the meeting of the Denver Bar Association held on February eleventh, are no less interested in America's Foreign Policy than their professional brethren of New York or San Francisco.

Mr. Ben M. Cherrington, executive secretary of the Foundation for the Advancement of the Social Sciences and introduced by President Toll as an authority on international affairs, addressed the association on "Recent Developments in the Foreign Policy of the United States." The speaker sketched in the historical background, reciting in some detail the intensive competition between nations during the years 1875 to 1914, the economic effects of the World war and the subsequent effort to develop machinery for co-operation through the World Court and the League of Nations.

Our own foreign policy, he declared, had been characterized by fairness, the only exceptions being the Caribbean and Central America. The World war had put us ahead two hundred years and we had now to find markets abroad for our manufactures, raw materials, and foreign soil for the investment of our surplus wealth. Spiritually, he said, we had recoiled in disgust from the World war and had decide to isolate ourselves. But we were now beginning to take part in international affairs and the first radical change in our foreign policy was in Latin America. South America, he declared, had become suspicious of us with the "new interpretation" of the Monroe doctrine under Roosevelt and there was now in some quarters hostility and even hatred of us. But Ambassador Morrow and Mr. Hoover, he said, had re-established the old idea of the Monroe doctrine in South America and had met the smaller nations on a parity, repudiating the doctrine of our paternal relation toward them.

The Pan-American Conference, held in Washington January 16th last, had been a great achievement and we had now agreed upon arbitration and conciliation of all judicial questions arising out of our relations with South American nations. The speaker thought this meant a "right-about-face" in our attitude and said that if we now intervened in Nicaragua the controversy would be subject to decision by a Conciliation Commission.

Our second great achievement, he said, was the signing and ratification of the Kellogg pact and he interpreted that as a declaration that we were no longer isolated but "realistic" and would now utilize the existing technique and machinery for the settlement of international disputes. The Kellogg Pact, he said, meant at least that we would now be obliged to "articulate" with the League of Nations and the next logical step for us would be "joining up" as an official member of the League.

N. B. to other Local Associations: "Try this on your piano" at some future meeting. It will provoke stimulating discussion, even if you happen to be, like Denver, dwelling in splendid isolation.

JOSEPH C. SAMPSON.

Kansas

Kansas City Bar Adopts Higher Education Standard

The grievance committee of the Kansas City Bar Association last year in its report found the major portion of its trouble arose with lawyers having no background and insufficient pre-education and recommended an educational standard as a cure. President Piatt, the incoming executive, appointed a special committee on legal education, ten in number, composed of college graduates, non-college men, night law school graduates and professors. At the January meeting this committee brought in a report recommending substantially the American Bar Association's standards. After prolonged debate the report was adopted over the efforts of members from the night law schools and of the non college members.

At the same meeting the committee on legislative matters and the committee to consider and make recommendations to the Association in the matter of the method and manner of selecting members of the State Judiciary, adopted a resolution favoring the introduction at this legislature of a bill providing for the nomination of judges of courts of record by nominating conventions, the delegates to which may not the same year be a delegate to or participate in any other convention for the nomination of persons to public office. The bill has been introduced and will probably pass.

President Newlin of the American Bar

Association made an address at the annual banquet.

Mississippi

Mississippi Bar to Meet in May

The Mississippi State Bar Association will hold its annual meeting at Clarksdale in May, Louis M. Jiggitts, of Jackson, secretary, announces, and letters have been sent to all members of the organization urging their attendance at the convention.

The meeting at Clarksdale is expected to eclipse the 1928 gathering which was held at Gulfport, and which up to that time had been considered the most successful convention held by the state lawyers. The American Bar Association will convene at Memphis in October and this has added great interest to the Clarksdale meeting.

The members of the association have been very gratified with the success of the Law Journal, now published by the University of Mississippi School of Law in conjunction with the state organization.

George W. Currie, Hattiesburg, is president of the State Bar Association, T. C. Kimbrough, University, vice president, and Louis M. Jiggitts, Jackson, secretary-treasurer. The executive committee is composed of W. C. Sweat, Corinth, R. H. Powell, Canton and M. S. Conner, Seminary.

Nebraska

Nebraska Bar President Appoints Committees

The Nebraska Bar Association will hold its next annual convention in Lincoln December 27 and 28, according to the Lincoln, Neb., Star. It has been the custom to hold the annual meeting for two successive years at Omaha and every third year in Lincoln.

Anan Raymond, of Omaha, new state president, has announced the following committee appointments for 1929:

Legal Education—E. B. Perry, Lincoln; W. C. Fraser, Omaha; Paul Jessen, Nebraska City; O. S. Spillman, Norfolk; Paul Martin, Sidney.

Inquiry—Paul F. Good, Lincoln, chairman; Fred A. Wright, Omaha; J. L. Cleary, Grand Island.

Membership—Walter D. James, Cambridge, chairman; Jay C. Moore, Tecumseh; Ralph Nickerson, Papillion; Marcus L. Poteet, Lincoln; Victor E. Spittler, Omaha; John L. Riddell, York; O. H. Doyle, Fullerton; F. L. Bollen, Friend; Donald T. Ayres, Ponca; Earl J. Moyer, Madison; Clarence A. Davis, Holdrege; B. M. Hardenbrook, Ord; William C. Schaper, Broken Bow; S. E. Torgeson, Kimball; Roland Scott, McCook; Julius D. Cronin, O'Neill; Samuel L. O'Brien, Alliance; Floyd Wright, Scottsbluff; John Mullen, Fairbury.

American Citizenship—Charles E. Matson, Lincoln, chairman; John B. Cain, Falls City; Clinton Brome, Omaha; Fred Berry, Wayne; Calvin Webster, Aurora; Frank J. Munday, Red Cloud; I. J. Nisley, Lexington.

Co-operation with American Law Institute—A. M. Morrissey, Omaha, chairman; L. J. TePoel, Omaha; L. H. Blackledge, Red Cloud; Sheldon Tefft, Lincoln; Frederick L. Wolff, Lincoln.

Special Committee on the Division of the Federal Eighth Circuit—N. H. Loomis, Omaha, chairman; R. A. Van Orsdel, Omaha; A. W. Richardson, Lincoln; E. B. Perry, Lincoln; Loren H. Laughlin, Beatrice.

Study of the Jury System—Robert W. Devoe, Lincoln, chairman; E. E. Good, Lincoln; James T. Begley, Plattsmouth; Raymond G. Young, Omaha; John H. Halligan, North Platte.

Creation of a Judicial Council—Robert W. Devoe, Lincoln ex officio chairman; J. L. Tewell, Sidney; Ralph M. Kryger, Neligh; W. L. Randall, Omaha.

The committee on legislation and the committee on judiciary, under the rules of the association, are continued over for another year. The members of the committee on legislation are R. F. Stout, Lincoln, chairman; R. A. Van Orsdel, Omaha; Clark Jeary, Lincoln; C. E. Abbott, Fremont; L. H. Laughlin, Beatrice; E. B. Crofoot, Omaha; B. R. Coulter, Bridgeport. The members of the committee on judiciary are J. L. Tewell, Sidney, chairman; C. O. Stauffer, Oakland; L. J. Lightner, Columbus; A. R. Davis, Wayne; Charles H. Stewart, Norfolk.

Miscellaneous

The Atoka (Okla.) Bar Association held its regular annual meeting in January, and the following were elected as officers: President, J. G. Ralls; Vice-President, W. M. Rainey; Secretary, A. R. Telle.

At meeting of the Seminole County (Okla.) Bar Association was held in the District Court room on January 19th and the annual election of officers was held with the following results: President, A. M. Fowler; Vice-President, Tom Huser; Secretary-Treasurer, Rose Cantrell.

The recently organized Elizabethton (Tenn.) Bar Association named the following as officers of the association: Attorney General Ben Allen, President; George F. Dugger, Vice-President; R. C. Campbell, Secretary-Treasurer.

The following new officers were elected for the coming year at a meeting of the Lincoln County (Okla.) Bar Association recently held: Emery A. Foster, President; P. D. Erwin, Vice-President; Walter G. Wilson, Secretary-Treasurer.

Richard J. Colbert was unanimously elected President of the Fayette County

Above is the Permanent Court of International Justice as presented in the Christmas Follies—a musical farce—of the Chicago Bar Association. As conceived by the writers of the farce, the Permanent Court had jurisdiction over every subject that would justify a joke and every available individual who could sing a song.

(Kentucky) Bar Association at a meeting on January 12th. Judge J. Keene Daingerfield was elected first Vice-President, and Myer Freyman and Joseph J. Bradley, Secretary and Treasurer, respectively.

At the annual business meeting and banquet of the Second Judicial District (Iowa) Bar Association, held in January, the following new officers were chosen: E. A. Anderson, of Chariton, President; H. C. Taylor, Bloomfield, Vice-President; J. S. Strong of Keosauqua, Secretary, and B. T. Smith, of Fairfield, Treasurer.

Floyd B. Olson was elected President of the Minnesota County (Minn.) Attorneys' Association at the recent annual meeting of that organization.

The Craig County (Okla.) Bar Association, held its annual meeting in January, and the following officers were elected for the ensuing year: President, Carey Caldwell; Vice-President, Paul O. Simms; Secretary and Treasurer, Addis A. Brown.

Boyle Clark, of Columbia, was elected President of the Boone County (Mo.) Bar Association, at the Association's dinner in January. Other officers chosen were: Don Carter, Sturgeon, Vice-President; William Tandy, Columbia, Secretary; Franklin Reagan, Columbia, Treasurer.

At the regular monthly meeting of the Glendale (Calif.) Bar Association held February 5th, Eugene Wix was chosen President, Charles Dyer, First Vice-President and Harry W. Chase, second Vice-President. C. H. Hasbrouck was re-elected Secretary-Treasurer.

Walter M. Allen was advanced to the position of President of the Sangamon County (Ill.) Bar Association at the annual dinner and meeting of that Association in February. Edward D. Henry was elected Vice-President and James T. Garretson was re-elected Secretary. Alton G. Hall was chosen as Treasurer.

The Mt. Vernon (Ill.) Bar Association held its annual meeting January 22nd. Officers for the ensuing year were elected as follows: President, Kirby Smith; Vice-President, Judge Conrad Schul; Secretary-Treasurer, Maurice DeWitt.

At the recent annual banquet of the El Paso (Tex.) Bar Association, Paul D. Thomas was elected President for the ensuing year. Gowan Jones and Ben E. Howell were re-elected Secretary and Treasurer, respectively, and Judge Ballard Coldwell, Major R. F. Burgess and Justice E. F. Higgins were chosen new directors.

Harry F. Payer was elected President of the Cuyahoga County (Ohio) Bar Association at the annual meeting of that organization on February 9th. Max M. Dworken was re-elected Secretary. Other officers chosen were as follows: John H. Orgill, First Vice-President; Professor Howard D. Burnett, Second Vice-President; Arthur H. Day, Third Vice-President, and W. J. Corrigan, Treasurer.

The Ottawa County (Okla.) Bar Association, at its meeting in February, elected the following officers: Vern E. Thompson, President; W. R. Chesnut, of Commerce, Vice-President; Homer E. Chandler, Secretary, and Moody R. Tidwell, Jr., Treasurer.

Maurice E. Harrison was chosen President of the Bar Association of San Francisco (Calif.) at the annual meeting of that association in January. M. C. Sloss was elected senior Vice-President, and Randolph V. Whiting, junior Vice-President. F. M. McAuliffe, George J. Presley, Fred L. Berry and John T. Pigott were made members of the Board of Governors.

The El Paso County (Col.) Bar Association, in recent annual session, elected the following officers: Victor W. Hunderford, President; John T. Haney, Vice President; Irvin Jones, Treasurer, and Charles Smith (re-elected) Secretary.

APPLICATION FOR MEMBERSHIP

To The American Bar Association,
209 S. La Salle St., Chicago, Ill. .....192...

I hereby make application for membership in the Association and certify the following:
(a. I have been a member in good standing of the Bar of the

State (or States) of.....since .....

I am a member of the following Associations of the Bar.....
(b) I am White ☐ Indian ☐ Mongolian ☐ Negro ☐

NAME.....

MAILING ADDRESS.....

CITY and STATE.....

Endorsed by.....Address.....

Check to the order of American Bar Association for $.....is attached.

If this application is made between July 1 and September 30, the check should be for $8.00; if between October 1 and December 31, for $6.00; if between January 1 and March 31, for $4.00, and if between April 1 and June 30 for $2.00.

A member receives the monthly American Bar Association Journal beginning with the month of his election, and the report of the annual meeting of the Association. This report is a record of the activities of the Association and contains a list of the members.